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# ADJUTANT AND INTERNAL AFFAIRS: MAKING THE CASE FOR ACCESS TO EVIDENCE OF A POLICE OFFICER'S PROPENSITY FOR VIOLENCE

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## INTRODUCTION

“When it comes down to whose story to believe—the criminal suspect or the police officer—in situations unlikely to involve other witnesses, the officer has a distinct advantage.”<sup>1</sup> This advantage is particularly pronounced in cases where the criminal defendant contends that the officer was the first (or only) aggressor and the officer maintains that he or she only used force as an appropriate last resort in response to the defendant’s criminally violent behavior.<sup>2</sup>

In fact, even in cases where the defendant is able to produce percipient witnesses,

[t]hose who attempt to corroborate allegations of brutality are often dismissed as untrustworthy or self-serving, because they are often friends or relatives of the [defendant], or gang members, or

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1. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 466 (2004).

2. As will be discussed,

[p]olice officers will [sometimes] invent cover charges when a suspect is injured during apprehension or while in custody. In order for the officer to defend against a potential claim of excessive force, he will attest that the injuries were a result of the defendant’s assault on the officer or on the defendant’s having resisted apprehension.

David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 476 (1999); see also Stanley Z. Fisher, “Just the Facts, Ma’am”: *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 15 (1993) (describing this process as “[l]ying to cover a mistake and [using] a criminal charge to buttress the lie” (alteration in original) (citation and internal quotation marks omitted)).

people who have had brushes with the law, or uneducated and inarticulate, or, for a variety of other reasons, easy to marginalize.<sup>3</sup>

Once “such corroboration is discounted, and . . . the credibility dispute is falsely reduced to a swearing contest between officer and [defendant], the tie goes to the officer.”<sup>4</sup> In the eyes of the fact-finder, the police are presumed to be disinterested witnesses whereas defendants have an obvious stake in the outcome of the proceedings.<sup>5</sup>

For defense counsel facing this predicament, the standard protocol throughout the country has included an investigation into the arresting officer’s history of using unnecessary or excessive force, with an eye towards introducing such evidence at trial.<sup>6</sup> Indeed,

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3. Susan Bandes, *Tracing the Pattern of No Pattern: Stories of Police Brutality*, 34 LOY. L.A. L. REV. 665, 669 (2001).

4. *Id.*

5. *Id.*; see also Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 245 (1998) (“Police testimony, even perjurious testimony, is more persuasive to juries than testimony by civilian witnesses. . . . [O]fficers have special credibility. In a confrontation between a civilian and a ‘blue knight,’ a clear-eyed uniformed police officer, jurors may well bend over backwards to believe the person in blue.”). Sadly, the penchant for crediting the testimony of police officers just because they are police officers does not appear to be a phenomenon limited to juries. As one judge stated while speaking on the condition of anonymity,

Many times, I feel the police are lying, but I can’t make a finding on a hunch. I’ve got to have some facts. If the defense can’t show anything, that the police officer is telling a lie, then I have to find for the policeman. . . . You walk into a case and as a rule you believe the police officer—you’ve got to believe police more than defendant.

Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 119 (1992); see also Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 696 (1996) (“In a swearing contest, the trial judge can discredit the police testimony only by branding the police as liars and accepting the word of an apparent felon. Typically the police, rather than the felon, will be telling the truth, but in a significant number of cases the police account is false. Nonetheless judges decide cases one at a time, so the police almost always win the swearing contest. The police are aware of this bias. The resulting incentives are exquisitely perverse. . . . [P]olice officers indifferent to constitutional rights can violate them with impunity.” (citation omitted)).

6. See Jeffrey F. Ghent, Annotation, *Accused’s Right to Discovery or Inspection of Records of Prior Complaints Against, or Similar Personnel Records of, Peace Officer Involved in the Case*, 86 A.L.R.3d 1170, 1175 (1978) (“Within the cases in which a defendant, charged with an offense involving violence against a peace officer alleged by the defendant to have been the aggressor, sought discovery or inspection of the officer’s personnel records, such disclosure has occasionally been totally disallowed but usually has been at least partially allowed, either in the form of in camera inspection by or in the presence of the trial judge or in the form of direct disclosure to the defendant.” (citations omitted)); see also *People v. Trujillo*, 114 P.3d 27, 30 (Colo. App. 2004) (“A

the general rule seems to be that where the officer is alleged to be the aggressor, his personnel file may be obtained by the defendant, or, at least, the defendant is entitled to have the trial judge examine the file in camera and determine whether the file contains anything favorable to the defendant which is not already known to the defendant.<sup>7</sup>

Massachusetts has always been something of an anomaly. Unlike most jurisdictions, Massachusetts did not permit evidence of an alleged victim's propensity for violence unless the defendant asserting a claim of self-defense was aware of such a propensity at the time of the incident.<sup>8</sup> In other words, unless a defendant happened to know that his arresting officer had a history of using excessive or unnecessary force, such evidence could not be admitted at trial.<sup>9</sup> Consequently, defendants seeking evidence of officer misconduct in the custody of internal-affairs divisions usually failed to demonstrate the requisite "specific, good faith reason for believing that the information is relevant to a material issue in the criminal proceedings and could be of real benefit to the defense."<sup>10</sup>

This all changed, or at least should have changed, in 2005, when the Massachusetts Supreme Judicial Court ("SJC") decided *Commonwealth v. Adjutant*.<sup>11</sup> In *Adjutant*, the court recognized that "evidence of a victim's prior violent conduct may be probative of whether the victim was the first aggressor where a claim of self-defense has been asserted and the identity of the first aggressor is in

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defendant who is charged with assaulting a police officer is entitled to disclosure of the fact that complaints charging excessive use of force have been filed against that officer." (citation omitted)); *Meyer v. City and County of Honolulu*, 731 P.2d 149, 150 (Haw. 1986) (instances of police officers' wrongdoing are admissible to establish the original aggressor).

7. JACK GOGER, *GEORGIA CRIMINAL TRIAL PRACTICE* § 17-10, at 1133 (2009); see also Francis C. Amendola et al., *Police Personnel Records*, 22A C.J.S. *Criminal Law* § 681 (2009) (collecting cases); DAVID RUDOVSKY & LEONARD SOSNOV, 2 WEST'S PENNSYLVANIA PRACTICE: CRIMINAL PROCEDURE LAW § 9.8, at 143 (2d ed. 2001).

8. In such cases, a defendant would have been permitted to introduce evidence of the victim's violent character "to show the defendant's reasonable apprehension for his safety." *Commonwealth v. Fontes*, 488 N.E.2d 760, 762 (Mass. 1986).

9. See, e.g., *Commonwealth v. Simpson*, 750 N.E.2d 977, 987 (Mass. 2001) ("There was no error in denying the defendant's request for the victim's personnel records because those records were irrelevant. . . . Although the defendant here claimed self-defense, the defendant never placed before the judge either at trial or at the motion hearing any evidence that . . . the defendant was aware at the time of the incident of any acts of violence by the victim.").

10. *Commonwealth v. Wanis*, 690 N.E.2d 407, 412 (Mass. 1998).

11. *Commonwealth v. Adjutant*, 824 N.E.2d 1 (Mass. 2005).

dispute.”<sup>12</sup> Citing the “overwhelming trend toward admitting some form of this evidence,”<sup>13</sup> the *Adjutant* court ultimately agreed with the majority view that such evidence is “properly admissible on the first aggressor issue, *regardless whether the victim’s violent character was known to the defendant at the time of the assault.*”<sup>14</sup>

In the wake of *Adjutant*, reasonable allegations concerning an officer’s inappropriate use of force suddenly became relevant to a material issue in criminal proceedings, i.e., the identity of the first aggressor.<sup>15</sup> To obtain access to such allegations, criminal defense attorneys across the state began filing motions for third-party records pursuant to the *Massachusetts Rules of Criminal Procedure*.<sup>16</sup> In response, the keepers of internal-affairs files frequently characterized these motions as “fishing expeditions for possibly relevant information”<sup>17</sup> and convinced many district and superior court judges to quash the subpoenas based on the absence of the “specific, good faith reason” first referenced in *Commonwealth v. Wanis*.<sup>18</sup>

In an effort to bolster affidavits in support of motions for internal-affairs records, many defense lawyers resorted to public-records requests.<sup>19</sup> In Massachusetts, there is a presumption that records in

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12. *Id.* at 3.

13. *Id.* at 8.

14. *Id.* at 7 (emphasis added).

15. The evidence arguably becomes more relevant if the officer in question happens to be part of “a core group of officers who engage in violence or potentially violent action in a more repetitive concentrated way.” Judith A.M. Scully, *Rotten Apple or Rotten Barrel?: The Role of Civil Rights Lawyers in Ending the Culture of Police Violence*, 21 NAT’L BLACK L.J. 137, 141 (2009); see also *id.* at 140-41 & nn.17-19 (citing studies that show that incidents of police violence are not evenly distributed among officers throughout a department).

16. See MASS. R. CRIM. P. 17(a)(2); see also *Opposition to Defendant’s Motion to Be Furnished with Boston Police Department Records on Internal Investigations*, in MASS. CONTINUING LEGAL EDUC., CRIMINAL LAW: CONFERENCE 2008 73-78 (2008) (presenting sample opposition to defendant’s third-party record request).

17. See *Commonwealth v. Dwyer*, 859 N.E.2d 400, 418 (Mass. 2006).

18. *Commonwealth v. Wanis*, 690 N.E.2d 407, 412 (Mass. 1998); see, e.g., *Commonwealth v. Fisher-Levesque*, No. 0723CR010191 (Mass. Dist. Ct. Sept. 29, 2008) (Leroy, J.) (on file with authors) (order denying motion for internal-affairs records). But see *Commonwealth v. Oyola*, No. 0823CR005364 (Mass. Dist. Ct. Aug. 28, 2008) (Schubert, J.) (on file with authors) (order allowing motion for internal-affairs records). In response to the ruling allowing Mr. Oyola’s motion for internal-affairs records, the City of Springfield moved for and obtained a stay in order to pursue a petition pursuant to General Laws of Massachusetts chapter 211, section 3. *Id.* However, before that petition could be filed, Mr. Oyola tendered a plea and was sentenced to time served. *Id.*

19. See, e.g., Memorandum in Support of Motion for Leave to Summons Internal Affairs Division Documents of the Ware Police Department Pertaining to Officer Shawn Crevier at 1, *Commonwealth v. Lavalley*, No. 0698CR3231 (Mass. Dist. Ct. June

the possession of municipalities are public<sup>20</sup> and should be disclosed within ten days of a request.<sup>21</sup> Nevertheless, many municipalities maintained that certain statutory exemptions precluded the disclosure of citizen complaints alleging excessive or unnecessary force.<sup>22</sup> Specifically, records custodians asserted that such complaints fell within the exemption for personnel file or information<sup>23</sup> or were exempt under the “investigatory materials” exemption.<sup>24</sup> In some instances, the same city law departments that denied public records requests on such grounds subsequently portrayed motions for third-party records as fishing expeditions due to the inability of defense counsel to confirm the existence of records the city attorneys had previously refused to disclose.<sup>25</sup>

The purpose of this Article is to advocate for the establishment of a protocol designed to give criminal defendants access to critical, exculpatory evidence in the possession of internal-affairs divisions of police departments. The establishment of such a protocol represents a necessary response to the endemic problem of “cover charges” filed by police officers who physically abuse citizens, then misuse the criminal justice system to justify their misconduct.<sup>26</sup>

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27, 2007) (on file with authors) (discussing how public records request revealed thirty-two pages of documents related to civilian complaints against arresting officer). See generally MASS. GEN. LAWS ch. 66, § 10 (2008).

20. See MASS. GEN. LAWS ch. 66, § 10(c).

21. See *id.* § 10(b).

22. See Steven D. Zansberg & Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, COMM. LAW., Fall 2004, at 34, 37 (“Police departments often react in a knee-jerk manner in denying public access to records of internal investigations concerning allegations of officer misconduct.”).

23. MASS. GEN. LAWS ch. 4, § 7, cl. 26(c).

24. *Id.* § 7, cl. 26(f). Notwithstanding a regulation prohibiting records custodians from inquiring into the purpose of a public-records request, municipalities have also denied requests on the ground that they were made by a criminal defendant, or his or her representative, in the context of a pending criminal case.

25. Letter from Alesia H. Days, Associate City Solicitor, City of Springfield, to Luke Ryan (Dec. 4, 2008) (on file with authors) (stating internal-affairs division records “are not attainable by way of M.G.L. c. 66 §10”); City of Springfield’s Response to Darry Berrocales’s Petition to the Single Justice of the Supreme Judicial Court Pursuant to G.L. c. 211, § 3, Berrocales v. City of Springfield, No. SJ-2009-0079 (Mar. 9, 2009) (on file with authors).

26. See Sarah Hughes Newman, Comment, *Proving Probable Cause: Allocating the Burden of Proof in False Arrest Claims Under § 1983*, 73 U. CHI. L. REV. 347, 371 (2006) (citing “[s]tudies of police practices in Philadelphia and New York [that] found that false charges by police were pervasive and were frequently used to cover street abuse”); see also *Commonwealth v. Hall*, 736 N.E.2d 425, 429 (Mass. App. Ct. 2000) (recognizing that “[i]f brutality had occurred,” the police “would have had a motive to cover up the beating to protect themselves or their fellow officers”); Newman, *supra*, at 371 n.164 (“[T]he police review board found that it was standard practice to lodge a

This problem is compounded by what has been called the “Blue Wall of Silence”—an unwritten code of loyalty that compels “all officers on a ‘scene’ . . . , if called upon, [to] recite identical versions of what happened . . . [and] support the authoritative version of events that contends that no brutality occurred.”<sup>27</sup>

Part One offers a brief history of police brutality and the role the Blue Wall of Silence has played in perpetuating it. Part Two provides a synopsis of the law of self-defense, as well as the evolution of the SJC’s attitude toward the use of propensity evidence in such cases. Part Three gives an overview of the Commonwealth’s version of the Freedom of Information Act before focusing on its construction in cases involving records in the custody of police departments. Part Four concerns the procedural hurdles criminal defendants have had to overcome to obtain records from third parties. Part Five highlights the drastically different ways municipalities in Massachusetts respond to requests for citizen complaints against police officers. Part Six reviews the way courts in other jurisdictions deal with requests for documentation concerning police misconduct in self-defense cases. Finally, Part Seven presents a proposal that we believe is sensitive to the legitimate concerns of courts, record keepers, and law enforcement, while simultaneously safeguarding the rights of criminal defendants.

Ultimately, the authors hope to show that permitting access to an officer’s track record of abuse will not only serve the interest of the particular defendant on trial, but will also promote police integrity by causing officers to think twice before engaging in indefensible behavior. This, in turn, will leave the public with greater confidence in the police who patrol their streets.<sup>28</sup>

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charge of resisting arrest or disorderly conduct against anyone who accused the police of brutality.” (alteration in original) (quoting GEORGE F. COLE, *THE AMERICAN SYSTEM OF CRIMINAL JUSTICE* 255 (4th ed. 1986)) (internal quotation marks omitted)).

27. Christopher Cooper, *Yes Virginia, There Is a Police Code of Silence: Prosecuting Police Officers and the Police Subculture*, 45 CRIM. L. BULL. 277, 280 (2009). The Blue Wall of Silence has been called “the greatest single barrier to the effective investigation and adjudication of complaints against” police officers. Chin & Wells, *supra* note 5, at 240.

28. As one scholar recently noted, “[P]erceptions of legitimacy play a critical role in inducing compliance with the law, and conversely, . . . perceptions of illegitimacy induce non-compliance.” I. Bennett Capers, *Crime, Legitimacy & Testifying*, 83 IND. L.J. 835, 837 (2008).

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## I. POLICE BRUTALITY AND THE BLUE WALL OF SILENCE

### A. *A Short History of Police Brutality*<sup>29</sup>

“Police brutality is not a new phenomenon in American society.”<sup>30</sup> In fact, along with the formation of the first organized police forces in the middle of the Nineteenth Century came the first cases of police misconduct.<sup>31</sup> By the end of the century, “[p]olice brutality, corruption and abuse of authority” had begun to present “American cities with some of their most pressing—and legally vexing—social problems.”<sup>32</sup>

The first in-depth examination of police misconduct occurred during the Hoover Administration under the auspices of the National Commission on Law Observance and Enforcement.<sup>33</sup> Commonly known as the Wickersham Commission after its chairperson, George W. Wickersham, the group published fourteen papers in June of 1930, including a “Report on Lawlessness in Law Enforcement.”<sup>34</sup> “In uncompromising language,” the Wickersham Commission “concluded that ‘[t]he third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary

29. According to one commentator,

Police brutality is conduct that is not merely mistaken, but taken in bad faith with the intent to dehumanize and degrade its target. It is described as “conscious and venal, . . . directed against persons of marginal status and credibility,” and “committed by officers who [usually] take great pains to conceal their [mis]conduct.”

Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1276 (1999) (omission in original) (quoting JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 19 (1993)).

30. Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 7 (2001) (noting that “[p]olice abuses” date back to “the early history of our nation”); see also Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 219-21 (2000).

31. David S. Cohen, Note, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at Reform*, 28 COLUM. HUM. RTS. L. REV. 165, 175 (1996); see also MARILYNN JOHNSON, *STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY* 12-29 (2003).

32. Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 18 (2000); see also JOHNSON, *supra* note 31, at 3 (citing “the routine bludgeoning of citizens by patrolmen armed with nightsticks or blackjacks”).

33. Samuel Walker, *Introduction to RECORDS OF THE WICKERSHAM COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, PART I: RECORDS OF THE COMMITTEE ON OFFICIAL LAWLESSNESS*, at v (1997), available at [http://www.lexisnexis.com/documents/academics/upa\\_cis/1965\\_WickershamCommPt1.pdf](http://www.lexisnexis.com/documents/academics/upa_cis/1965_WickershamCommPt1.pdf).

34. *Id.*



confessions or admissions—is widespread.’”<sup>35</sup> Although this controversial report led to the establishment of the first internal-affairs bureaus,<sup>36</sup> public scrutiny of police brutality did not occur until the 1960s.<sup>37</sup>

During this decade, “widespread police brutality sparked a series of urban riots, leading the U.S. Commission on Civil Rights to declare that ‘police brutality in the United States . . . is a serious and continuing problem.’”<sup>38</sup> Due to “[a]dvances in technology and more critical media coverage,” many citizens got their first glimpse of “police officers using excessive force on individuals engaged in peaceful demonstrations.”<sup>39</sup> By the end of the decade, some began to feel that “[t]he beating of blacks and other targeted groups was not an anomaly, but a norm of American life.”<sup>40</sup> “Still, bad habits die slowly.”<sup>41</sup> During the next two decades, credible allegations of police brutality made headlines in cities across the country.<sup>42</sup>

In 1991, the beating of Rodney King by four Los Angeles police officers placed an unprecedented focus on the issue of police brutality.<sup>43</sup> “A few years later, the Ramparts police scandal gave the LAPD yet another black eye in terms of police conduct, excessive use of force, and related civil rights violations.”<sup>44</sup>

In 1992, New York City Mayor David N. Dinkins established a temporary commission to investigate police corruption.<sup>45</sup> Among other things, the investigation revealed

that in contemporary policing, corruption and brutality were often linked. The Commission found that brutality was, at times, an introduction and, at others, a companion to narcotics corrup-

35. *Id.* at ix (quoting NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 4 (1931)).

36. *Id.* at x.

37. Levenson, *supra* note 30, at 7 (stating that this era featured a close examination by many Americans of all their “public institutions”).

38. Gilles, *supra* note 32, at 18.

39. Levenson, *supra* note 30, at 7.

40. *See id.*

41. *Id.* at 8 (describing the death of a Texas inmate who allegedly committed suicide in a county jail but whose autopsy revealed injuries in places where they could not have been self-inflicted).

42. *See id.*

43. Gilles, *supra* note 32, at 18.

44. Karen R. Smith, *Crime, Punishment and the Central District*, 36 Sw. U. L. REV. 323, 336-37 (2007). *See generally* Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545 (2001).

45. Hon. Harold Baer, Jr. & Joseph P. Armao, *The Mollen Commission Report: An Overview*, 40 N.Y.L. SCH. L. REV. 73, 74 (1995).

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tion. . . . Police officers told the Commission during private interviews and public hearings that they were initiated into the world of corruption by committing acts of brutality. Acts of violence against suspects and prisoners were used as a barometer to prove an officer was a tough cop who could be trusted and accepted by fellow officers.<sup>46</sup>

In May 2000, the United States Department of Justice published a report on police attitudes toward abuse of authority; over 900 officers were surveyed, randomly chosen from 121 departments.<sup>47</sup> The survey revealed that more than one-fifth of police officers felt fellow officers sometimes, often, or always used more force than necessary.<sup>48</sup> This finding was consistent with a previous study conducted in Illinois where twenty percent of police respondents acknowledged observing other officers using “considerably more force than necessary.”<sup>49</sup>

“In April 2001, the city of Cincinnati experienced a riot reminiscent of the 1960s: an outburst of African American rage following the fifteenth fatal shooting of a young black man by the Cincinnati Police Department in six years.”<sup>50</sup> The following year, state and local law enforcement agencies with 100 or more sworn officers received 26,556 complaints regarding the inappropriate or excessive use of force.<sup>51</sup> Approximately 2000 of these complaints “were *sustained*, meaning there was sufficient evidence of the allegation to justify disciplinary action against the subject officer(s).”<sup>52</sup>

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46. *Id.* at 77 (citations omitted); see also David Rudovsky, *Police Abuse: Can the Violence be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 481-82 (1992) (“Studies of excessive use of force point out that a predictable catalyst to abuse is the officers’ perception that their authority is being questioned or defied. Even verbal questioning of authority leads many police officers to believe that their power and position have been threatened.” (citation omitted)).

47. Roberta Ann Johnson, *Whistleblowing and the Police*, 3 RUTGERS J. L. & URB. POL’Y 74, 79 (2005).

48. *Id.*

49. *Id.*

50. Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 3 (2003) (citation omitted).

51. MATTHEW J. HICKMAN, U.S. DEP’T OF JUSTICE, CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 1-2 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ccpuf.pdf>.

52. *Id.* at 1; see also Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 496 (2008). The fact that 2000 complaints were substantiated is significant in light of the persistent criticism that “internal disciplinary bodies . . . often fail to take complaints seriously, conduct a reasonable, thorough or impartial investigation or effectively recommend discipline for officers responsible for

### B. *The Blue Wall of Silence*

“The existence of some form of a police code of silence in many police departments across the nation is well documented in court opinions, scholarly literature, news reports, and police investigatory commission reports examining the subject.”<sup>53</sup> At its core, the code “consists of one simple rule—an officer does not provide adverse information against a fellow officer.”<sup>54</sup>

While it is impossible to quantify the extent of the code’s impact within a particular department, studies indicate that “[s]ome form of a Code of Silence will develop among officers in virtually any agency” and efforts to uproot it altogether “will be futile.”<sup>55</sup> One such study conducted by the National Institute of Ethics between February 1999 and June 2000 utilized confidential questionnaire and interview responses by 1157 officers and 1016 academy recruits from across the country.<sup>56</sup> Seventy-nine percent of the academy recruits surveyed said that “a law enforcement Code of Silence exists and is fairly common throughout the nation.”<sup>57</sup> Over half these recruits reported that the existence of the code “doesn’t really bother them,” and nearly one quarter maintained that the code actually had a positive role to play in cases where an officer employed excessive force against an unruly suspect.<sup>58</sup>

Ultimately, the National Institute of Ethics concluded that the code of silence is triggered more frequently “by excessive use of force incidents . . . than [by] any other specific circumstance.”<sup>59</sup> In short, this study lends credence to the claim that the code permits “violent officers to feel comfortable that their actions will never be discovered and that they will not suffer retribution from brutality.”<sup>60</sup> As one former New York City police officer once put it,

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human rights violations.” Andrea J. Ritchie & Joey L. Mogul, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States*, 1 DEPAUL J. FOR SOC. JUST. 175, 237 (2008) (observing that complaints are frequently “found to be unsubstantiated based on the mere fact that the officer involved denies that any violation took place”).

53. Chin & Wells, *supra* note 5, at 237-40 (citations omitted).

54. Chemerinsky, *supra* note 44, at 575.

55. NEAL TRAUTMAN, NAT’L INST. OF ETHICS, POLICE CODE OF SILENCE FACTS REVEALED, <http://www.aele.org/loscode2000.html> (last visited Mar. 10, 2010).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Myriam Gilles, *Keeping Quiet, Covering Up and Never, Ever Ratting: The Effects of the Code of Silence on Reforming Police Culture*, GEO. U. L. CENTER CONTINUING LEGAL EDUC., Apr. 30, 2003, 2003 WL 22002097, at \*7; *see also* Koepke, *supra* note

“[T]he police code of silence is stronger than the mafia’s code of omerta.”<sup>61</sup>

To understand the origins of the code of silence requires a close look at the nature of police work. According to two commentators, “The experience of danger and authority may contribute to the creation of a police code of silence.”<sup>62</sup> In his analysis of the Los Angeles Police Department’s Board of Inquiry report on the Rampart Scandal, Professor Erwin Chemerinsky offered this explanation for the role silence plays in police departments:

Silence offers cover to officers who abuse the public, lie, and otherwise break the law. Silence cements the bond of trust between partners whose mutual dependence feels like the best protection in a job where one wrong move can mean death. Silence seems necessary to officers who view themselves at war with crime, criminals, and an anti-cop community. Silence is easier than tangling with fellow cops.<sup>63</sup>

Here, in Massachusetts, perhaps no case better illustrates the way in which the code of silence exacerbates the problem of police brutality than the 1995 beating of a black, undercover Boston Police Officer named Michael Cox. While in pursuit of a suspect, Cox attempted to climb over a fence when he felt a blow to the back of the head that “rocked his brain, causing it to collide with the inside of his skull.”<sup>64</sup> Additional blows followed until Cox managed to

30, at 213-14 (“Because of the Blue Wall of Silence, police brutality and police perjury have been, and continue to be, protected and facilitated by the police culture.”).

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61. Cohen, *supra* note 31, at 192 n.123 (citation omitted).

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62. Chin & Wells, *supra* note 5, at 251 (citations and internal quotation marks omitted). Specifically, Chin and Wells theorize that

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[t]he combination of the two creates a volatile environment in which the police may develop values at odds with those of the larger society. As these features of the police role are incorporated into officers’ underlying values and ideals, the end result may be a cultural matrix which entails a banding together, a cover-up, a conspiracy of silence. This facet of police culture, at least in the eyes of the culture’s members, provides protection. Such a close-knit camaraderie becomes the foundation for personal security in a hazardous, and even life-threatening day-to-day line of work, where officers rely upon their companions for protection. Even otherwise honest officers, in the face of another’s misconduct, may look the other way due to the enormous pressure to maintain silence, and may even commit perjury in an attempt to conceal the misconduct from courts, prosecutors, and the public.

*Id.*

63. Chemerinsky, *supra* note 44, at 574.

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64. DICK LEHR, *THE FENCE: A POLICE COVER-UP ALONG BOSTON’S RACIAL DIVIDE* 133-34 (2009).

find and flash his badge.<sup>65</sup> Once the officers administering the beating realized that their victim was in fact another officer, the code of silence took over.<sup>66</sup> Boston Police Chief Paul Evans would later chalk up the futility of a four-year internal affairs investigation to the absence of officers willing to cooperate.<sup>67</sup>

## II. THE LAW OF SELF-DEFENSE

In cases where a suspect has been injured as a result of his or her encounter with the police, fact-finders inevitably hear testimony that the officers involved in the arrest used only such force as was necessary or that the injuries suffered by the suspect were self-inflicted. According to Professor Alan Dershowitz, “such boiler-plate police testimony” tends to unfold accordingly:

We attempted to place the perpetrator under arrest, . . . but he began to swing wildly at the officers. I tried to place him in handcuffs, . . . but he started to reach into his jacket for what I believed to be a weapon. When I grabbed his hands in order to prevent him from reaching for a weapon, he began to kick in every direction, hitting his legs against the side of the police car and other hard objects.

At this point, he fell to the ground and started to bang his head and body against the pavement. We attempted to subdue him because we were concerned that he would hurt himself. He was strong and it took us several minutes to subdue him . . . All of his injuries, and ours as well, were sustained as a result of his resistance and our efforts to subdue him.<sup>68</sup>

In Massachusetts, these kinds of allegations typically serve as the factual bases for charges of disorderly conduct,<sup>69</sup> assault and battery on a police officer,<sup>70</sup> and resisting arrest.<sup>71</sup> While an assertion of self-defense has always been available to Massachusetts defendants facing such charges, the following section will illustrate

65. *Id.* at 135.

66. *See id.* at 145-47.

67. John Joseph Powers, Jr., Note, *Eroding the Blue Wall of Silence: The Need for an Internal Affairs Privilege of Confidentiality*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 19, 28 (2000) (noting “that three of the officers implicated in the Cox beating had nine prior misconduct complaints filed against them”).

68. Chin & Wells, *supra* note 5, at 254 (omissions in original) (quoting Alan Dershowitz, *A Police Badge is Not a License to Commit Perjury*, SAN DIEGO UNION-TRIB., Apr. 4, 1991, at B11).

69. *See* MASS. GEN. LAWS ch. 272, § 53 (2008).

70. *Id.* ch. 265, § 13D.

71. *Id.* ch. 268, § 32B.

why evidence of an officer's history of violence has rarely found its way into the hands of defense counsel or been presented to fact-finders.

#### A. *Brief Overview of Self-Defense in General*

The Commonwealth has a longstanding tradition of upholding the right of citizens to use force to protect themselves from harm. "That a man may defend his person, his lands, or goods, against the intrusion or invasion of those who have no lawful authority over them, would seem entirely unquestionable."<sup>72</sup> Self-defense is applicable to a wide range of actions; however, much of the case law has developed in homicide prosecutions.<sup>73</sup>

In order to use deadly force to repel an attacker, a person must have "availed himself of all reasonable and proper means in the circumstance to avoid combat."<sup>74</sup> This right is also limited to the defendant who has "reasonable ground to believe and actually did believe that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force."<sup>75</sup> "The right of self-defence arises from necessity, and ends when the necessity ends."<sup>76</sup> Finally, a person may use "no more force [than] was reasonably necessary in all the circumstances of the case."<sup>77</sup>

Ultimately, whether self-defense was warranted and, if so, how much force was permissible are questions of fact.<sup>78</sup> The fact-finder considers the physical capabilities of the combatants, the steps taken to avoid the confrontation, and the type of weapons used.<sup>79</sup> Attention is also given to the location of the events, particularly whether the incident occurred in the defendant's home.<sup>80</sup> "Massa-

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72. *Commonwealth v. Kennard*, 25 Mass. (8 Pick.) 133, 137 (1829).

73. 32 JOSEPH R. NOLAN & LAURIE J. SARTORIO, MASSACHUSETTS PRACTICE SERIES: CRIMINAL LAW § 679, at 703-04 (3d ed. 2001).

74. *Commonwealth v. Shaffer*, 326 N.E.2d 880, 883 (Mass. 1975), *superseded by statute*, An Act Permitting the Killing or Injuring of a Person Unlawfully in a Dwelling, ch. 696, 1981 Mass. Acts 1020. While a person must exhaust all possible means of retreat, there is no absolute duty to retreat where it would put a person in further danger. *Commonwealth v. Pike*, 701 N.E.2d 951, 957 (Mass. 1998).

75. *Commonwealth v. Harrington*, 399 N.E.2d 475, 479 (Mass. 1980).

76. *Commonwealth v. Kendrick*, 218 N.E.2d 408, 414 (Mass. 1966).

77. *Harrington*, 399 N.E.2d at 479.

78. *Id.* at 511.

79. *Kendrick*, 218 N.E.2d at 414.

80. *Commonwealth v. Shaffer*, 326 N.E.2d 880, 883 (Mass. 1975), *superseded by statute*, An Act Permitting the Killing or Injuring of a Person Unlawfully in a Dwelling, ch. 696, 1981 Mass. Acts 1020.

chusetts has long followed the evidentiary rule that permits the introduction of evidence of the victim's violent character, if known to the defendant, as it bears on the defendant's state of mind and the reasonableness of his actions in claiming to have acted in self-defense."<sup>81</sup>

B. *The Use of Self-Defense to Resist an Excessive Force Arrest*

One of the earlier cases in the Commonwealth to address the right of self-defense was based on whether a private citizen had the right to defend himself from the potentially unlawful actions of a police officer in seizing contested property.<sup>82</sup> The law continues to grapple with assertions of self-defense in response to allegations of excessive force on the part of an arresting officer.

For example, Robert Graham was severely beaten by police officers in May of 1998.<sup>83</sup> This caused him to fear the police and potential future assaults.<sup>84</sup> "[H]ospital records admitted in evidence corroborated his testimony as to the events of 1998 and established that he had suffered severe injuries (including a skull fracture, internal bleeding, broken teeth, and various other fractures, lacerations, and abrasions) that required a lengthy hospitalization."<sup>85</sup> Sixteen months later, Graham saw sirens approaching his location and said that he attempted to gain unlawful entry into an apartment building from the fire escape in order to hide from the police.<sup>86</sup> The officers, responding to a citizen's report of a possible breaking and entering in progress, found him on the fire escape and ordered him to stop.<sup>87</sup> Graham fled, entered a nearby apartment building through a skylight, and hid under a bed.<sup>88</sup> The officers contacted the owner and searched the home.<sup>89</sup> The homeowner also conducted a search and noticed some belongings moved from under a bed.<sup>90</sup> The homeowner looked under the bed, saw a man "curled up in a fetal position" with his head facing the wall, and notified the officers.<sup>91</sup>

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81. Commonwealth v. Adjutant, 824 N.E.2d 1, 6 (Mass. 2005).

82. Commonwealth v. Kennard, 25 Mass. (8 Pick) 133, 136 (1829).

83. Commonwealth v. Graham, 818 N.E.2d 1069, 1076 (Mass. App. Ct. 2004).

84. *Id.* at 1075.

85. *Id.*

86. *Id.* at 1073.

87. *Id.* at 1072.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

All of the officers on the scene told the same story of Graham violently charging at them when the mattress was lifted.<sup>92</sup> “Attempts to spray the defendant with mace did not subdue him, and Officer Charbonnier, who weighed 220 pounds, held onto the defendant, but lost control of him.”<sup>93</sup> The officers tackled Graham in the hallway and handcuffed him.<sup>94</sup>

Graham testified that the mattress was thrown back and he faced an officer with a gun pointed at his head.<sup>95</sup>

Officer Charbonnier grabbed him from behind and was choking him with his flashlight, so that he could barely breathe, while another officer, possibly Officer Foley, hit him so hard in the face his front teeth were knocked out. He also was being kicked in the ribs to get him down, and when he was on the floor an officer had a foot on his head, and smashed his head into the floor. Throughout this time, the defendant thought he might be killed by the police.<sup>96</sup>

Graham lost consciousness and spent three days in the hospital.<sup>97</sup> Evidence showed a considerable amount of blood in the bedroom where he was discovered and in an adjacent hallway.<sup>98</sup>

Graham appealed his convictions for assault and battery against a police officer and resisting arrest.<sup>99</sup> The appeals court reversed the convictions and discussed the use of self-defense during an arrest where excessive force is alleged.<sup>100</sup> It held that the right to resist the use of a police officer’s excessive force is rooted in the same doctrine as self-defense.<sup>101</sup>

A defendant has a right to a jury instruction on self-defense if there is sufficient evidence for the claim.<sup>102</sup> “In determining whether sufficient evidence of self-defense exists, all reasonable inferences should be resolved in favor of the defendant, and, no matter how incredible his testimony, that testimony must be treated as true.”<sup>103</sup> The burden then shifts to the Commonwealth to show be-

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1076.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1071.

100. *Id.* at 1075-79.

101. *Id.* at 1075 n.6.

102. *Commonwealth v. Harrington*, 399 N.E.2d 475, 479 (Mass. 1980).

103. *Commonwealth v. Pike*, 701 N.E.2d 951, 955 (Mass. 1998).



yond a reasonable doubt that the defendant did not use self-defense.<sup>104</sup> In the context of either a lawful or unlawful arrest, a defendant cannot use reasonable force to defend himself unless the police officer uses excessive force.<sup>105</sup> Both issues of excessive force on the part of the police officer and reasonable force in self-defense are questions for the fact-finder.<sup>106</sup>

### C. *Evidence of Self-Defense in Massachusetts*

Historically, a defendant could only introduce evidence of a victim's violent past if the defendant was aware of that past at the time of the encounter.<sup>107</sup> Under this rule, defendants had no right to access prior complaints about an officer's use of excessive force pursuant to *Wanis*, unless they happened to know about the officer's propensity for violence at the time of their encounter.<sup>108</sup>

Then, in 2005, the SJC decided *Commonwealth v. Adjutant*.<sup>109</sup> This decision altered the evidentiary landscape in self-defense cases by entrusting trial judges with "the discretion to admit in evidence specific incidents of violence that the victim is reasonably alleged to have initiated" to show that the victim was the first aggressor.<sup>110</sup>

The facts in *Adjutant* were compelling. Rhonda Adjutant was found guilty of voluntary manslaughter in the death of Stephen Whiting.<sup>111</sup> Adjutant worked for an escort service and accepted an assignment to go to Whiting's apartment.<sup>112</sup> When she arrived there, Adjutant telephoned her employer to confirm that she was in the apartment and received payment.<sup>113</sup> During this call, Whiting snorted two lines of cocaine.<sup>114</sup> When Adjutant offered to begin a massage, Whiting indicated that he expected intercourse.<sup>115</sup> Adju-

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104. *Graham*, 818 N.E.2d at 1077.

105. *Id.*

106. *Id.*

107. *See* *Commonwealth v. Adjutant*, 824 N.E.2d 1, 6 (Mass. 2005).

108. *See, e.g., Commonwealth v. Simpson*, 750 N.E.2d 977, 987 (Mass. 2001) ("There was no error in denying the defendant's request for the victim's personnel records because those records were irrelevant . . . . Although the defendant here claimed self-defense, the defendant never placed before the judge either at trial or at the motion hearing any evidence that . . . *the defendant was aware at the time of the incident of any acts of violence by the victim.*" (emphasis added) (citations omitted)).

109. 824 N.E.2d 1.

110. *Id.* at 3.

111. *Id.*

112. *Id.* at 3-4.

113. *Id.* at 4.

114. *Id.*

115. *Id.*

tant called the escort agency again to tell the dispatcher of Whiting's demands and then handed the telephone to Whiting.<sup>116</sup> The dispatcher attempted to explain that intercourse was not part of the original agreement.<sup>117</sup> Whiting requested a refund but neither Adjutant nor the dispatcher would comply.<sup>118</sup> The dispatcher told Adjutant to leave the apartment and stayed on the telephone while she began to leave.<sup>119</sup>

According to Adjutant, "when she attempted to leave, Whiting pushed her onto his bed and retrieved a crowbar from the kitchen, at which point Adjutant picked up a knife that was lying on the bedside table."<sup>120</sup> While still on the phone with Adjutant, the dispatcher requested that the company driver return to pick her up.<sup>121</sup> Whiting came towards her swinging the crowbar, making contact with a countertop and then Adjutant's leg.<sup>122</sup> She nicked his face with the knife and started to run to the door but Whiting tackled her.<sup>123</sup> Adjutant then stabbed Whiting in the shoulder but he continued to block her access to the door.<sup>124</sup> When the drivers arrived at the apartment, they heard Adjutant screaming and kicked in the door.<sup>125</sup> Adjutant testified that when the door swung open Whiting continued to advance toward her with the crowbar and she stabbed him in the neck.<sup>126</sup>

The main question for the jury was "whether Adjutant acted in self-defense."<sup>127</sup> Adjutant's attorney wanted to introduce evidence of Whiting's reputation for violence as well as certain violent acts that he committed while intoxicated.<sup>128</sup> The medical examiner con-

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* Other witnesses offered conflicting testimony as to the sequence of events that lead to Whiting's death. *See id.* As previously noted, "all reasonable inferences should be resolved in favor of the defendant, and, no matter how incredible his testimony, that testimony must be treated as true." *Commonwealth v. Pike*, 701 N.E.2d 951, 955 (Mass. 1998).

121. *Adjutant*, 824 N.E.2d at 4.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* The defense had evidence of an event less than a year prior to his death in which Whiting was attacked in his own apartment by two armed, masked men. Whiting believed that one of the men was his dealer who saw that Whiting had a substantial amount of money in his apartment. *Id.* When the men demanded the money, Whiting

firmed that Whiting had cocaine in his system and an elevated blood alcohol level.<sup>129</sup> Two of Whiting's neighbors testified that they saw Whiting make sexual advances toward two women in the neighborhood on the night of his death and that he appeared intoxicated.<sup>130</sup> However, the defense was barred from cross-examining these witnesses regarding Whiting's reputation for violence or prior violent acts, as these were unknown to Adjutant at the time of the fatal encounter.<sup>131</sup> Even after the prosecutor introduced evidence of Whiting's calm disposition, the defense was not allowed to impeach this testimony with Whiting's reputation or prior acts of aggression.<sup>132</sup> The appeals court affirmed the conviction.<sup>133</sup> The SJC reversed and remanded with Justice Cowin dissenting.<sup>134</sup>

To reach its ultimate conclusion, the court discussed the two possible ways to use propensity evidence to further a claim of self-defense. Such evidence may either be employed to (1) show "that at the time of the assault the defendant was reasonably apprehensive for his safety, and used a degree of force that was reasonable in light of the victim's violent tendencies" or (2) "prove that the victim and not the defendant was likely to have been the 'first aggressor.'" <sup>135</sup> As Justice Cordy explained, "Under the first theory, the evidence is not admitted for the purpose of showing that the victim acted in conformance with his character for violence; under the second theory, it is."<sup>136</sup> Prior to *Adjutant*, the SJC had not had occasion to rule on the admissibility of evidence offered solely for the purpose of the second theory.<sup>137</sup>

The *Adjutant* court ultimately found that allowing evidence of the victim's violent character has probative value and could help

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attacked them with a crowbar. *Id.* He did not back down despite being outnumbered and outmatched. *Id.* The men stole the money and left Whiting near death. *Id.* Whiting contacted the police and gave grand jury testimony. *Id.*

129. *Id.* at 5.

130. *Id.*

131. *Id.* During Adjutant's sentencing hearing, one neighbor testified that he confronted Whiting about damage to a common yard. *Id.* at 5 n.4. Whiting, who was allegedly on cocaine, "chased after his neighbor 'like a raging bull.'" *Id.* Two other neighbors were allegedly threatened with a butcher knife and a friend was allegedly doused with boiling water after arguing with Whiting. *Id.*

132. *Id.* at 5 (omission in original).

133. Commonwealth v. Adjutant, 800 N.E.2d 346 (Mass. App. Ct. 2003) (unpublished table decision), *rev'd*, 824 N.E.2d 1.

134. *Adjutant*, 824 N.E.2d at 15.

135. *Id.* at 6.

136. *Id.*

137. *Id.*

the jury decide who was the first aggressor when the facts were in dispute.<sup>138</sup> Surveying the jurisprudence from other jurisdictions, the court found it persuasive that all federal courts and forty-five state appellate courts had adopted the rule “that some form of such evidence is properly admissible on the first aggressor issue, regardless whether the victim’s violent character was known to the defendant at the time of the assault.”<sup>139</sup>

Once the court decided that evidence should be admitted to show the victim’s violent character, a question of form remained.<sup>140</sup> Adjutant argued that specific acts of violence perpetrated by Whiting, as well as his reputation for violence, should be admitted at her retrial.<sup>141</sup> On this point, the SJC disagreed and refused to admit reputation evidence.<sup>142</sup> According to the court, “Reputations or opinions are often formed based on rumor or other unreliable hearsay sources, without any personal knowledge on the part of the person holding that opinion.”<sup>143</sup> In contrast, “evidence of specific instances of conduct is the most convincing.”<sup>144</sup> The new rule allows a defendant to introduce “evidence of specific acts of prior violent conduct that the victim is reasonably alleged to have initiated, to support [a] claim of self-defense.”<sup>145</sup>

Prior to adopting this rule, the court considered the following five arguments against admitting evidence of a victim’s propensity for violence:

- (1) the danger of ascribing character traits to a victim with proof of isolated incidents, (2) the worry that jurors will be invited to acquit the defendant on the improper ground that the victim deserved to die, (3) the potential for wasting time trying collateral questions surrounding the victim’s past conduct, (4) the unfair difficulty of rebuttal by the prosecution, and (5) the strategic im-

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138. *Id.* at 8.

139. *Id.* at 7. The court noted that is also the standard set forth in Rules 404 and 405 of the Federal Rules of Evidence. *Id.* at 6.

140. *Id.* at 10-11.

141. *Id.* at 11.

142. *See id.* at 13-14. In taking this position, the court acknowledged that Massachusetts would continue to be something of an anomaly since “[a]ll other State jurisdictions that admit character evidence in these circumstances admit reputation evidence.” *Id.* at 11.

143. *Id.* at 13.

144. *Id.* at 11 (quoting FED. R. EVID. 405 advisory committee’s note) (internal quotation marks omitted).

145. *Id.* at 13.

balance that flows from the inability of prosecutors to introduce similar evidence of the defendant's prior bad acts.<sup>146</sup>

In rejecting these arguments, the majority placed its faith in the ability of trial judges to “weigh[ ] the probative value of evidence against any prejudicial effect it might have on a jury.”<sup>147</sup> Ultimately, the *Adjutant* court gave trial judges the discretion to admit so much of a defendant's proffered evidence as is “noncumulative and relevant to the defendant's self-defense claim.”<sup>148</sup>

In 2007, *Commonwealth v. Pring-Wilson* refined the rule initially set forth in *Adjutant*.<sup>149</sup> While the conflict in *Adjutant* was between two people, the physical altercation in *Pring-Wilson* involved three.<sup>150</sup> The victim's friend, Samuel Rodriguez, was also a party to the dispute and may have been the initial aggressor.<sup>151</sup> “Because Rodriguez played a central role in the fight . . . and because the purpose of the *Adjutant* rule is to give the jury a full picture of the altercation so as to make an informed decision about the identity of the initial aggressor or aggressors,” *Pring-Wilson* held that some evidence of Rodriguez's history of violence should have been admitted.<sup>152</sup> In keeping with the rationale of *Adjutant*, the court again noted the key role of the trial judge to use discretion in admitting only relevant evidence.<sup>153</sup>

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146. *Id.* at 11. Justice Cowin's dissent voiced similar concerns that this type of evidence, “unknown to a defendant, do[es] little to help a jury resolve the issue whether a defendant was the first aggressor.” *Id.* at 15 (Cowin, J., dissenting).

147. *Id.* at 12 (majority opinion) (quoting *Commonwealth v. Arroyo*, 810 N.E.2d 1201, 1210 (Mass. 2004)).

148. *Id.* at 13. Trial judges also have the ability to instruct the jury on the purpose of the evidence in order to help the jury decide the question of who was the first aggressor and avoid clogging the process with collateral issues. *Id.*

149. *Commonwealth v. Pring-Wilson*, 863 N.E.2d 936, 938-39 (Mass. 2007). When the court decided *Adjutant*, it held that the new rule it announced would only be applied prospectively with an exception made for Rhonda Adjutant. *Adjutant*, 824 N.E.2d at 15. At that time, Pring-Wilson had already been convicted of voluntary manslaughter and sentenced, but his appeal was pending. *Pring-Wilson*, 863 N.E.2d at 938-39. His application for a new trial was granted based upon the fact that the identity of the first aggressor was integral to his self-defense claim, and the trial judge repeatedly denied his requests to present evidence of the victim's prior violent acts. *Id.* at 939. The SJC determined that the judge's decision to grant a new trial was not an abuse of discretion. *Id.* at 947.

150. *Pring-Wilson*, 863 N.E.2d at 950.

151. *Id.*

152. *Id.*

153. *Id.* at 951.

In the wake of *Adjutant, Pring-Wilson*, and their progeny,<sup>154</sup> citizen complainants who had previously alleged physical aggression on the part of police officers suddenly became potential witnesses capable of corroborating claims that the very same officers also assaulted the defendants on trial.<sup>155</sup> To obtain access to the identity of these complainants, defense counsel began pursuing copies of their complaints by way of public records requests.<sup>156</sup>

### III. MASSACHUSETTS PUBLIC RECORDS LAW

Though the release of certain public records was required as early as the Nineteenth Century, “the modern Massachusetts Public Records Law” was not codified until 1973.<sup>157</sup> Modeled on the federal Freedom of Information Act,<sup>158</sup> the law defines “[p]ublic records” to include

books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof.<sup>159</sup>

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154. In 2008, the appeals court clarified that the new rule announced in *Adjutant* does not just apply in homicide cases. *Commonwealth v. Gaynor*, 895 N.E.2d 758, 761 n.3 (Mass. App. Ct. 2008).

155. While it appears statistically unlikely that many of these complainants were sustained, *see supra* notes 51-52 and accompanying text, *Adjutant* permits the introduction of “specific acts of prior violent conduct that the victim is *reasonably alleged* to have initiated.” *Commonwealth v. Adjutant*, 824 N.E.2d 1, 13 (Mass. 2005) (emphasis added). In other words, a determination by an internal-affairs division that the officer in question was the first aggressor is not a prerequisite to admitting testimony about the incident from the complainant. *See id.*

156. *See, e.g.*, Memorandum in Support of Motion for Leave to Summons Internal Affairs Division Documents of the Ware Police Department Pertaining to Officer Shawn Crevier, *supra* note 19, at 1 (“Through a public records request, thirty-two pages of documents related to civilian complaints against Officer Crevier have been made available to the defendant by the Ware Police Department.”).

157. REBECCA S. MURRAY, FREEDOM OF INFORMATION AND PUBLIC RECORDS LAW IN MASSACHUSETTS 4-5 (2009).

158. *See id.* One significant difference between the federal and state laws is that while the former includes “specific exemptions from disclosure for confidential law enforcement sources, such statutory language is absent from the Massachusetts public records law.” Powers, *supra* note 67, at 21.

159. MASS. GEN. LAWS ch. 4, § 7, cl. 26 (2008).

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Excluded from this “broad definition of the term ‘public records’”<sup>160</sup> are twelve categories of information.<sup>161</sup> These exemptions are “strictly construed” in light of a “statutory presumption in favor of disclosure,”<sup>162</sup> and it is the record custodian’s burden to show that a record comes within the purview of a particular statutory exemption.<sup>163</sup>

A public record request begins “with a reasonable description of the desired information” delivered either by mail, email, facsimile, or in person.<sup>164</sup> The custodian has up to ten calendar days to provide the requested documents or a written explanation as to the basis of a denial.<sup>165</sup> The custodian is prohibited from inquiring into the purpose of the request.<sup>166</sup> If the custodian denies the record request or fails to respond within ten days, the requestor has a right to appeal to the Supervisor of Records (“the Supervisor”).<sup>167</sup> The custodian has a duty to advise the requestor of this remedy.<sup>168</sup>

As the following discussion will make clear, the trend in Massachusetts is “toward more public disclosure of police documents in an effort to restrict the abuse of power by police officers.”<sup>169</sup> Accordingly, an argument can be made that citizen complaints, or at least portions of them, should be disclosed upon request.

#### A. *Bougas v. Chief of Police*<sup>170</sup>

In *Bougas*, three individuals were charged with misdemeanors after the police arrived to disperse a gathering at a home in Lexington.<sup>171</sup> As a result of the incident, numerous police reports were

160. *Globe Newspaper Co. v. Police Comm’r*, 648 N.E.2d 419, 424 n.9 (Mass. 1995).

161. *Wakefield Teachers Ass’n v. Sch. Comm.*, 731 N.E.2d 63, 66 (Mass. 2000).

162. *Attorney Gen. v. Assistant Comm’r*, 404 N.E.2d 1254, 1256 (Mass. 1980).

163. MASS. GEN. LAWS ch. 66, § 10(c).

164. SEC’y OF THE COMMONWEALTH, DIV. OF PUB. RECORDS, A GUIDE TO THE MASSACHUSETTS PUBLIC RECORDS LAW 6 (2009) [hereinafter A GUIDE TO THE MASSACHUSETTS PUBLIC RECORDS LAW], available at <http://www.sec.state.ma.us/pre/prepdf/guide.pdf>.

165. *Id.* As will be discussed, the statutory exemptions most frequently cited by internal-affairs divisions are the privacy and investigatory exemptions.

166. *Id.* at 7. While the custodians are allowed to charge reasonable fees for collecting and delivering the records, the regulations encourage record keepers to waive the fee when it is in the public’s best interest. *Id.*

167. 950 MASS. CODE REGS. 32.08 (2003).

168. *Id.* The requestor also has the right to bring a civil action in superior court or directly before the SJC. See MASS. GEN. LAWS ch. 66, § 10(b).

169. Powers, *supra* note 67, at 20.

170. 354 N.E.2d 872 (Mass. 1976).

171. *Id.* at 875.

generated, and the police chief received several letters from private citizens.<sup>172</sup> After portions of a couple police reports were printed in the local paper, one of the defense attorneys filed a public records request in the hopes of obtaining these and other records related to the incident.<sup>173</sup> When the request was denied, defense counsel filed suit.<sup>174</sup> A superior court judge ruled in favor of the police chief and found that the records in question fell under the “investigatory materials” exemption.<sup>175</sup> The SJC affirmed.<sup>176</sup>

According to the SJC, the investigatory exemption served four salutary purposes. First, it prevented the “premature disclosure of the Commonwealth’s case prior to trial.”<sup>177</sup> Second, it guarded against “the disclosure of confidential investigative techniques, procedures, or sources of information.”<sup>178</sup> Third, the exemption encouraged “individual citizens to come forward and speak freely with police concerning matters under investigation.”<sup>179</sup> Finally, it facilitated complete candor on the part of police officers when “recording their observations, hypotheses and interim conclusions.”<sup>180</sup>

In the case before it, the court concluded that the disclosure of the investigatory materials at issue would “detract from effective law enforcement to such a degree as to operate in derogation, and

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172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 876.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* According to two commentators, “A number of courts have questioned the unsupported assertion that subjecting such witness statements . . . (whether from civilians or uniformed officers) to public disclosure will necessarily inhibit, or chill, the full, frank, and accurate recounting of recollections or observations of key events.” Zansberg & Campos, *supra* note 22, at 36. As one Colorado court put it, “[T]he proposition that knowledge on the part of individual police officers that the information they provide to [internal-affairs] investigators will later be subject to disclosure . . . will have a detrimental effect on frank and open communication . . . [and] should be subject to careful scrutiny.” *Martinelli v. District Court*, 612 P.2d 1083, 1090 (Colo. 1980). Another federal judge noted that “the alternative . . . [i.e.,] some possibility of disclosure,” could more likely incite candor:

In short, officers will feel pressure to be honest and logical when they know that their statements and their work product will be subject to demanding analysis by people with knowledge of the events under investigation and considerable incentive to make sure that the truth comes out . . . . Thus there is a real possibility that officers working in closed systems will feel less pressure to be honest than officers who know that they may be forced to defend what they say and report.

*Kelly v. City of San Jose*, 114 F.R.D. 653, 665 (N.D. Cal. 1987).



not in support, of the public interest.”<sup>181</sup> With respect to the police reports, the *Bougas* court found it significant that these items included opinions of the police officers on the scene, notes from interviews with witnesses, and possible future leads of the investigation.<sup>182</sup> As for the letters from private citizens, the SJC appeared concerned that the disclosure of these items could make citizens less likely to volunteer information to the police in the future.<sup>183</sup>

The requestors’ status as defendants in pending criminal proceedings made no difference to the court. As Justice Reardon put it, “the statute does not provide a ‘standing’ requirement but extends the right to examine public records to ‘any person’ whether intimately involved with the subject matter of the records he seeks or merely motivated by idle curiosity.”<sup>184</sup>

While the decision proved to be a disappointment for advocates of government transparency, the opinion concluded by setting forth some valuable principles.

[A]n agency such as a police department cannot simply take the position that, since it is involved in investigatory work and some of its records are exempt under the statute, every document in its possession somehow comes to share in that exemption. There is no blanket exemption provided for records kept by police departments nor does the investigatory materials exemption extend to every document that may be placed within what may be characterized as an investigatory file. There must be specific proof elicited that the documents sought are of a type for which an exemption has been provided.<sup>185</sup>

#### B. *Reinstein v. Police Commissioner*<sup>186</sup>

These principles took on new significance three years later when an attorney from the American Civil Liberties Union of Massachusetts made a formal request to the Boston Police Department (“BPD”) to inspect the records of discharged service weapons during a five-year period.<sup>187</sup> The request was denied because the custodian claimed that confidential information, such as CORI

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181. *Bougas*, 354 N.E.2d at 876.

182. *Id.*

183. *Id.* at 876-77.

184. *Id.* at 877.

185. *Id.* at 878.

186. 391 N.E.2d 881 (Mass. 1979).

187. *Id.* at 883.

background information and ongoing criminal investigations, was interwoven in the requested documents.<sup>188</sup>

When the case eventually found its way before the SJC, the court noted that, notwithstanding the presumption in favor of disclosure and the statutory burden on custodians to prove the applicability of an exemption, the typical records seeker “usually starts with a handicap of ignorance as to what exactly the records contain.”<sup>189</sup> In practice, this handicap had permitted custodians, armed with “the not inconsiderable advantage of full knowledge,” to argue successfully that “any attempt at analysis” would be tantamount to full disclosure.<sup>190</sup>

In an effort to level the playing field, the *Reinstein* court approved a procedure initially set forth in the federal case of *Vaughn v. Rosen*,<sup>191</sup> whereby records keepers must “itemize and index the records requested and give detailed justifications for [their] claims.”<sup>192</sup> According to the *Vaughn* court, such a procedure was necessary due to the “inevitable [fact] that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information.”<sup>193</sup> As Judge Wilkey put it,

Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. . . . In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information . . . .<sup>194</sup>

Ultimately, the *Reinstein* court based its decision to remand the matter on a then-recent amendment to the public records law, which extended access “to any nonexempt ‘segregable portion’ of a public record.”<sup>195</sup> In other words, the fact that a document may contain some exempt material does not justify barring access to all of it.<sup>196</sup>

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188. *Id.* at 883-84.

189. *Id.* at 888.

190. *Id.*

191. 484 F.2d 820 (D.C. Cir. 1973).

192. *Reinstein*, 391 N.E.2d at 888.

193. *Vaughn*, 484 F.2d at 823.

194. *Id.* at 823-24.

195. *Reinstein*, 391 N.E.2d at 885.

196. *Id.* at 886. The court also relied on the newly created statutory duty of segregation to resolve the Boston Police Department’s claim that the information in question was exempt from disclosure pursuant to the privacy exemption. *See id.* at 887-88.

C. *Globe Newspaper Co. v. Police Commissioner*<sup>197</sup>

On September 15, 1992, a reporter from the *Boston Globe* made a public records request for materials compiled by the internal-affairs division of the Boston Police Department during its probe of alleged police misconduct in the investigation of the murder of Carol Stuart and the shooting of her husband, Charles Stuart.<sup>198</sup> This probe was preceded by a federal investigation which culminated with a twenty-page report and press release documenting egregious police misconduct.<sup>199</sup> According to the federal report, the Boston police coerced several witnesses into identifying a black man as the Stuarts' assailant.<sup>200</sup> In response to the federal report, the Boston Police Department issued its own fifty-three page report, which paraphrased civilian and police officer interviews.<sup>201</sup>

In spite of these substantial prior disclosures, the records custodian declined to provide the information requested, thereby prompting the newspaper and its reporter to seek declaratory and injunctive relief in the superior court.<sup>202</sup> After hearing testimony from several witnesses, the trial judge produced a lengthy and detailed memorandum evincing a painstaking in camera review of the materials.<sup>203</sup> Based, in part, on the extensive publicity previously given to information the Boston Police Department had voluntarily disclosed,<sup>204</sup> the judge ordered the records custodian to provide certain materials that might otherwise have been protected pursuant to the privacy or investigatory exemptions.

On appeal, the SJC separated the records in question into five distinct categories and applied the different exemption standards to each.<sup>205</sup> Through this process, the court was able to identify which

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Public records regulations now refer to this practice as "indexing." See 950 MASS. CODE REGS. 32.08 (2003).

197. 648 N.E.2d 419 (Mass. 1995).

198. *Id.* at 423-24.

199. *Id.* at 423.

200. *Id.* As it turned out, Charles Stuart murdered his wife and then shot himself prior to concocting a cover story that they had been attacked by an unknown black assailant. See Charles A. Radin, *A Mirror on Race: 1989 Slaying Forced the City to Confront Its Divisions*, BOSTON GLOBE, Oct. 22, 1999, at A1.

201. *Globe Newspaper Co.*, 648 N.E.2d at 423.

202. *Id.* at 423-24.

203. *Id.* at 424. In the future, the court suggested a protective order may serve as a more time-efficient method to analyze the issues and promote judicial economy. *Id.* at 430.

204. *Id.* at 424.

205. *Id.*

records would be made public and which qualified for exemptions, thereby reinforcing the rule that there are no blanket exemptions.<sup>206</sup>

With respect to the privacy exemption,<sup>207</sup> the SJC held that its invocation “require[d] a balancing between any claimed invasion of privacy and the interest of the public in disclosure.”<sup>208</sup> According to the court, privacy interests were implicated whenever “disclosure would result in personal embarrassment to an individual of normal sensibilities,” where “the materials sought contain[ed] intimate details of a highly personal nature,” or when “the same information is [un]available from other sources.”<sup>209</sup> On the other side of the scale was the public’s interest in discovery, which included the value of knowing that public servants were following the rule of law in performance of their duties.<sup>210</sup>

In contrast, the investigatory exemption did not require a balancing test but rather a two-part analysis.<sup>211</sup> The first question was whether the requested documents were “investigatory materials necessarily compiled out of the public view.”<sup>212</sup> The second asked whether disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”<sup>213</sup>

The court’s ultimate findings regarding the records in question, though interesting, have limited precedential value in resolving the status of citizen complaints alleging police brutality. This becomes clear when one considers that the statements at issue in the *Globe* case were obtained from *witnesses* of police misconduct who had to

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206. *Id.* at 425.

207. This exemption “creates two categories of records exempt from public disclosure: first personnel and medical files or information and second other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.” *Worcester Telegram & Gazette Corp. v. Chief of Police (Worcester Telegram II)*, 787 N.E.2d 602, 605 n.3 (Mass. App. Ct. 2003) (citation and internal quotation marks omitted). The *Globe Newspaper Co.* opinion dealt only with the second subset of materials. As will be discussed, personnel and medical files or information are “absolutely exempt without need to consider the impact of disclosure upon the privacy rights of a specifically named individual.” *Id.* at 605.

208. *Globe Newspaper Co.*, 648 N.E.2d at 428.

209. *Id.* at 425 (citations and internal quotation marks omitted).

210. *Id.*

211. *Id.*

212. *Id.* (internal quotation marks omitted).

213. *Id.* (internal quotation marks omitted).

be prodded or coaxed to “com[e] forward with information.”<sup>214</sup> Rarely, if ever, is a *victim* of police brutality the subject of such encouragement. On the contrary, it is a well-documented fact that law enforcement officers frequently “discourage [victims] from filing complaints, using a variety of strategies.”<sup>215</sup> In the words of one former police chief: “The police world has a hundred different ways of deflecting complaints.”<sup>216</sup> In short, citizens who manage to bring complaints despite threats, misinformation, and coercion are hardly the sort of individuals whose participation hinges on a promise “that the public will [not] have access to any statements they make.”<sup>217</sup>

#### D. Worcester Telegram & Gazette Corp. v. Chief of Police<sup>218</sup>

In May, 1999, “Shawn Wilder filed a complaint alleging misconduct by Patrolman Michael A. Tarckini when, without cause or explanation, he detained and arrested Wilder at gunpoint.”<sup>219</sup> After a subsequent investigation by the internal-affairs division of the Worcester Police Department exonerated the officer, a city newspaper sought documents related to the investigation.<sup>220</sup> The records

214. *Id.* As one federal judge has noted, “It is not uncommon for witnesses to be reluctant to provide statements alleging police misconduct.” *McAllister v. City of Memphis*, No. 01-2925 DV, 2005 WL 948762, at \*1 (W.D. Tenn. May 22, 2005).

215. Jenny Rachel Macht, *Should Police Misconduct Files Be Public Record? Why Internal Affairs Investigations and Citizen Complaints Should Be Open to Public Scrutiny*, 45 CRIM. L. BULL. 1006, 1035 (2009); see also Reenah L. Kim, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 499 n.170 (2001) (“Studies have indicated that police tend to discourage citizen complaints by acting hostile when complaints are filed, showing lack of objectivity in the investigation, failing to provide formal adversary hearings, and being unwilling to impose meaningful discipline on officers found guilty of misconduct.”).

216. ALLYSON COLLINS, HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 50 (1998) (citation and internal quotation marks omitted) (quoting former Minneapolis Police Chief Tony Bouza)). One undercover investigation of this phenomenon revealed “officers refusing to provide a form for a complaint . . . and ordering undercover complainants to leave the building.” Macht, *supra* note 215, at 1035-36 (citing *David Goldstein Reports: Want to File a Complaint Against a Cop? Good Luck!* (CBS television broadcast), available at <http://cbs2.com/goldstein/CHP.File.Complaint.2.516330.html>).

217. *Globe Newspaper Co.*, 648 N.E.2d at 427.

218. *Worcester Telegram & Gazette Corp. v. Chief of Police (Worcester Telegram I)*, 764 N.E.2d 847 (Mass. 2002); *Worcester Telegram II*, 787 N.E.2d 602 (Mass. App. Ct. 2003).

219. *Worcester Telegram I*, 764 N.E.2d at 849; Brief of the Plaintiff/Appellee at 3, *Worcester Telegram I*, 764 N.E.2d 847 (No. SJ-08601).

220. *Worcester Telegram I*, 764 N.E.2d at 849.

custodian denied this request.<sup>221</sup> The paper then appealed to the Supervisor who directed the custodian to produce the requested records and “redact[ ] only the names and identifying details of voluntary witnesses, complainants, and informants.”<sup>222</sup> When the custodian refused to comply with this order, the newspaper brought suit in superior court.<sup>223</sup>

As part of that action, the newspaper filed “a motion to permit inspection of the public records sought, subject to a protective order.”<sup>224</sup> Concluding that the custodian “could not be the sole arbiter of the applicability of any exemption to disclosure,” the trial court allowed the motion.<sup>225</sup> Eventually, this ruling came before the SJC on the custodian’s petition for interlocutory relief.<sup>226</sup>

Writing for a unanimous court, Justice Spina conceded that all of the documents requested could be “‘personnel files’ that would be exempt from disclosure.”<sup>227</sup> Nevertheless, given the equally strong possibility that the documents contained “a combination of personnel information and other materials that would be segregable and subject to disclosure as ‘public records,’” the court refused to permit the custodian to “decide unilaterally, without any oversight, what documents are subject to disclosure and what documents are exempt.”<sup>228</sup> In the final analysis, the court regarded the custodian’s designation of the records to be inconsequential.<sup>229</sup> Characterizing the custodian’s efforts to shield the records from any scrutiny as “wholly inconsistent” with the purpose of the public records law, the SJC upheld the limited disclosure the trial judge had allowed.<sup>230</sup>

When the case returned to the superior court, the newspaper examined the contested public records pursuant to the protective order, then moved for summary judgment.<sup>231</sup> A superior court judge ultimately ordered the custodian to “release, as public records, . . . the entire, unredacted contents of the Wilder file, excepting only documents containing information protected as crimi-

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221. *Id.*

222. *Id.*

223. *Id.* at 850.

224. *Id.*

225. *Id.*

226. *Id.* at 851.

227. *Id.* at 853.

228. *Id.*

229. “What is critical,” Justice Spina wrote, “is the nature or character of the documents, not their label.” *Id.* at 854.

230. *Id.* at 853.

231. *Worcester Telegram II*, 787 N.E.2d 602, 604 (Mass. App. Ct. 2003).

nal offender record information (CORI).”<sup>232</sup> Once again, the records custodian appealed.<sup>233</sup>

Citing *Wakefield Teachers Ass’n v. School Committee*,<sup>234</sup> the keeper of the police records argued that “all the material in the Wilder file is categorically exempt ‘personnel [file] or information’ because it is part of a disciplinary report.”<sup>235</sup> The appeals court disagreed.

Of particular relevance, the court noted the essential role of internal-affairs investigations: “A citizenry’s full and fair assessment of a police department’s internal investigation of its officer’s actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights.”<sup>236</sup> The court read the Policy and Procedure of the Worcester Police Department internal-affairs division to support the conclusion that public confidence is bolstered by transparency in its investigations.<sup>237</sup> “It would be odd, indeed,” wrote Justice Grasso, “to shield from the light of public scrutiny as ‘personnel [file] or information’ the workings and determinations of a process whose quintessential purpose is to inspire public confidence.”<sup>238</sup>

#### IV. THIRD-PARTY MOTION PRACTICE IN MASSACHUSETTS

Of course, it is by now well-settled that “[a] defendant’s right of access to information gathered by an internal affairs division does not turn on whether the investigatory materials are or are not subject to disclosure as public records.”<sup>239</sup> When the SJC made this pronouncement in *Commonwealth v. Wanis*, it went on to offer the following guidance to judges confronting defense motions for access to internal-affairs records unrelated to their own criminal cases:

A defendant may not obtain information in the possession of an internal affairs division, other than statements of percipient witnesses, without seeking a summons for the production of that information and, if production is opposed, without making a

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232. *Id.*

233. *Id.*

234. *Wakefield Teachers Ass’n v. Sch. Comm.*, 731 N.E.2d 63 (Mass. 2000).

235. *Worcester Telegram II*, 787 N.E.2d at 605. The *Wakefield* court had previously ruled that a “disciplinary decision and report” by a superintendent of schools concerning the conduct of a public school teacher was exempt from disclosure. *Id.*

236. *Id.* at 607.

237. *Id.* at 607 & n.6.

238. *Id.* at 608.

239. *Commonwealth v. Wanis*, 690 N.E.2d 407, 411 (Mass. 1998).

showing to a judge (normally by affidavit) that there is a specific, good faith reason for believing that the information is relevant to a material issue in the criminal proceedings and could be of real benefit to the defense. Such a standard meets constitutional requirements. Personal information about a police officer, his or her previous conduct, and the conclusions of those conducting an internal affairs investigation, for example, should be disclosed only on such a showing.<sup>240</sup>

To understand what this preliminary showing entails (and why it may no longer be an accurate statement of the law) one must view *Wanis* in the context of a series of cases construing a criminal defendant's right to third-party records related to the treatment of alleged victims of sexual assaults.

A. Commonwealth v. Two Juveniles<sup>241</sup>

In 1984, counsel for two juveniles charged with rape filed motions seeking an in camera inspection of the complainant's counseling records.<sup>242</sup> Rather than rule on these motions, a juvenile court judge reported questions to the SJC concerning the tension between the absolute confidentiality afforded to rape counseling records by section 20J of chapter 233<sup>243</sup> and a defendant's constitutional right to due process.<sup>244</sup>

Because the plain language of the statute expressly forbade any dissemination of communications involving a sexual assault

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240. *Id.* at 412 (citation omitted).

241. 491 N.E.2d 234 (Mass. 1986), *abrogated in part by* Commonwealth v. Stockhammer, 570 N.E.2d 992 (Mass. 1991).

242. *Id.* at 236.

243. The statute at issue provides, in pertinent part:

A sexual assault counsellor shall not disclose such confidential communication, without the prior written consent of the victim . . . .

Such confidential communications shall not be subject to discovery and shall be inadmissible in any criminal or civil proceeding without the prior written consent of the victim to whom the report, record, working paper or memorandum relates.

MASS. GEN. LAWS ch. 233, § 20J (2008).

244. *Two Juveniles*, 491 N.E.2d at 236; *see* MASS. R. CRIM. P. 34 (permitting trial judges to report questions to the SJC). The two questions were,

(1) Does G.L. c. 233, § 20J . . . prevent this Court from permitting an *in camera* inspection of communications between a sexual assault counselor and an alleged victim of a sexual assault; and (2) if so, is G.L. c. 233, § 20J constitutional in light of the Confrontation Clause of the Sixth Amendment of the Constitution of the United States or the cognate provisions of the Massachusetts Declaration of Rights?

*Two Juveniles*, 491 N.E.2d at 236 (internal quotation marks omitted).



counselor,<sup>245</sup> the SJC observed that an in camera inspection could only be justified by “a determination that the juveniles have a constitutional right which transcends the statute and requires the courts to fashion an exception to the statute (or perhaps, alternatively, to strike it down).”<sup>246</sup>

The court then endeavored to “outline certain principles” to assist judges in deciding when “the absolute privilege expressed in § 20J, a nonconstitutionally based testimonial privilege, must yield at trial to the constitutional right of a criminal defendant to have access to privileged communications.”<sup>247</sup> This process led to a look at the prima facie showings required by other courts faced with similar circumstances.<sup>248</sup> After noting the numerous ways in which this burden had been expressed,<sup>249</sup> the SJC declined the opportunity to delineate the preliminary showing required for access to material covered by Section 20J.<sup>250</sup> Instead, the court simply stated that a defendant seeking an “in camera inspection of . . . privileged material . . . must show a legitimate need for access to the communications.”<sup>251</sup> The court further noted that this hurdle could not be overcome by proof that the communications were “likely to be relevant and material to the case” or that they were unavailable from any other source.<sup>252</sup> Ultimately, the SJC held that the propriety of in camera review hinged on the defendant’s ability to “demonstrate that the protected information is likely to be useful to his defense.”<sup>253</sup>

#### B. Commonwealth v. Stockhammer<sup>254</sup>

The *Stockhammer* case involved another allegation of rape where the defense was consent.<sup>255</sup> Approximately nine months after the undisputed intercourse took place,<sup>256</sup> the complainant attempted suicide and received medical attention at Waltham-Weston

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245. *Two Juveniles*, 491 N.E.2d at 236.

246. *Id.* at 237.

247. *Id.* at 237, 238.

248. *Id.* at 238.

249. *Id.* at 238-39.

250. *Id.* at 239.

251. *Id.*

252. *Id.*

253. *Id.* at 239-40.

254. 570 N.E.2d 992 (Mass. 1991).

255. *Id.* at 997.

256. The defendant claimed that the parties had intercourse on numerous occasions; the complainant testified that the only time that they had sex was the night the defendant raped her. *See id.* at 995-96.

Hospital.<sup>257</sup> Two days after her release from this facility, the complainant obtained six days of inpatient treatment from a New York hospital, then four months of counseling from a licensed social worker.<sup>258</sup>

Prior to trial, the defendant attained access to the Waltham-Weston Hospital records.<sup>259</sup> Pursuant to a court order mandating the production of psychotherapy or counseling records, the social worker's records were also produced and the judge conducted an in camera review of them.<sup>260</sup> Satisfied that none of these records contained material that would be helpful to the defense, the judge refused to order their disclosure.<sup>261</sup>

After the defendant was convicted, he learned about the existence of the New York hospital records and moved for a new trial.<sup>262</sup> Prior to ruling on the motion, the trial judge conducted an in camera review of these records and concluded that they were no more helpful than the social worker records that he had previously refused to disclose.<sup>263</sup>

The SJC reversed.<sup>264</sup> Writing for a unanimous court, Justice Greaney took issue with the Supreme Court's then-recent conclusion in *Pennsylvania v. Ritchie*<sup>265</sup> that "the interests of the defendant and the State in a fair trial are fully protected by an in camera review of [privileged] records by the trial judge."<sup>266</sup> As Justice Greaney put it,

The Federal standard requiring only an in camera review by the trial judge of privileged records requested by the defendant rests on the assumptions that trial judges can temporarily and effectively assume the role of advocate when examining such records; and that the interests of the State and complainant in the confidentiality of the records cannot adequately be protected in any other way. Neither assumption withstands close scrutiny.<sup>267</sup>

With respect to the "first assumption," the SJC reiterated its longstanding concern regarding "[t]he danger lurking in the prac-

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257. *Id.* at 996.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 1000-01.

264. *Id.*

265. 480 U.S. 39 (1987).

266. *Stockhammer*, 570 N.E.2d at 1001.

267. *Id.*

tice of . . . in camera review [of privileged documents]" given the difficulty for judges to discern "what is necessary to the defense."<sup>268</sup> As to the "second assumption," *Stockhammer* expressed the skepticism "that the interests of the State and the complaining witness in preserving the confidentiality of communications to psychotherapists and social workers can *only* be protected by an in camera review procedure."<sup>269</sup> Citing the "broad discretion" trial judges have "to control the proceedings before them," the SJC offered that "judges could allow counsel access to privileged records only in their capacity as officers of the court," and "[p]rotective orders (enforced by the threat of sanctions) requiring counsel and other necessary participants in the trial not to disclose such information could be entered."<sup>270</sup>

At the conclusion of its opinion, the SJC made an important distinction between the case before it and *Two Juveniles*. Whereas the earlier case implicated the "absolute privilege" set forth in section 20J, *Stockhammer* involved two statutes<sup>271</sup> "contain[ing] exceptions limiting their scope."<sup>272</sup> According to the court, this difference in the level of legislative protection afforded to information had implications when considering the extent of a defendant's constitutional rights to disclosure.<sup>273</sup> In short, *Stockhammer* advised courts to be less reluctant in ordering the production of documents when only qualified statutory privileges served as the source of their protection.<sup>274</sup>

### C. Commonwealth v. Bishop<sup>275</sup>

The *Bishop* case concerned allegations of sexual misconduct perpetrated by a Boy Scout leader against two teenage brothers.<sup>276</sup> Prior to trial, the defendant filed several motions to compel the disclosure of certain records related to the treatment of the alleged

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268. *Id.* (omission and second alteration in original) (quoting *Commonwealth v. Clancy*, 524 N.E.2d 395, 398-99 (Mass. 1988) (internal quotation marks omitted)).

269. *Id.* at 1002.

270. *Id.*

271. See MASS. GEN. LAWS ch. 112, § 135 (2008); ch. 233, § 20B.

272. *Stockhammer*, 570 N.E.2d at 1002.

273. *Id.* at 1002-03.

274. The SJC would later reach a different conclusion in *Commonwealth v. Oliveira*. 728 N.E.2d 320, 326 (Mass. 2000) (declining to impose different standards depending on the type of statutory privilege involved).

275. 617 N.E.2d 990 (Mass. 1993), *abrogated by* *Commonwealth v. Dwyer*, 859 N.E.2d 400 (Mass. 2006).

276. *Id.*

victims.<sup>277</sup> Following a hearing on one of the motions concerning records in the possession of a medical clinic, the judge declined to order the disclosure of “[e]ntries dealing with psychiatric and mental health assessments and treatment contained in the clinic’s records.”<sup>278</sup>

After the defendant was convicted, he asserted that this ruling violated his constitutional right to a fair trial.<sup>279</sup> The SJC, in affirming the conviction, began its opinion with a recitation of bed-rock principles:

[W]hen relevant evidence is excluded from the trial process for some purpose other than enhancing the truth-seeking function, the danger of convicting an innocent defendant increases. Relevant evidence refers to any evidence which has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. . . . “[D]isclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.”<sup>280</sup>

By the same token, the court acknowledged that the “revelation of privileged information adversely affects the purposes underlying the need for the confidential relationship and serves as a disincentive to the maintenance of such relationships.”<sup>281</sup>

In an effort to balance these “competing interests,” the *Bishop* court sought to set forth a new standard.<sup>282</sup> However, prior to delving into this task, the court paused to make an important point: because the typical defendant cannot be certain that the privileged record contains “exculpatory or even relevant information,” a claim that “nondisclosure . . . violates his or her right to a fair trial is tenuous.”<sup>283</sup>

Under such circumstances, “requiring the defendant to make too substantial a showing to justify piercing a privilege” runs the risk of “plac[ing] the defendant in a ‘Catch-22’ situation.”<sup>284</sup> In order to obtain “access to the privileged records [the] defendant must

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277. *Id.* at 993-94.

278. *Id.* at 994 (alteration in original) (internal quotation marks omitted).

279. *Id.*

280. *Id.* (second alteration in original) (quoting *Commonwealth v. Wilson*, 602 A.2d 1290, 1299 (Pa. 1992) (Zappala, J., dissenting)).

281. *Id.*

282. *Id.* at 995.

283. *Id.*

284. *Id.* at 996 n.6.

specifically allege what useful information may be contained in the target records. However, [the] defendant has no way of making these specific allegations until he has seen the contents of the records.”<sup>285</sup>

Ultimately, *Bishop* settled on a threshold showing that required a defendant to “advance, in good faith, at least some factual basis which indicates how the privileged records are likely to be relevant to an issue in the case.”<sup>286</sup> For defendants able to overcome this initial burden, the next step in the process entailed judicial scrutiny of the records.<sup>287</sup> Assuming the reviewing judge found at least some portion of the records relevant, *Bishop* established a defendant’s right to “access to the relevant privileged materials for the limited purpose of” filing a motion to disclose “the relevant communications to the trier of fact.”<sup>288</sup>

#### D. Commonwealth v. Fuller<sup>289</sup>

Like *Stockhammer*, *Fuller* involved allegations of sexually assaultive behavior where the defense was consent.<sup>290</sup> Unlike *Stockhammer* where the privileges in question were qualified in nature, the privilege at issue in *Fuller* was the same “absolute privilege” at the heart of *Two Juveniles*.

During the discovery process, the prosecution informed Fuller that his accuser had received counseling after the incident from a rape crisis center (the “Center”) “and also that she had received similar counseling in 1991 and 1992, after a sexual assault in 1991 involving a different perpetrator.”<sup>291</sup> When a superior court judge ordered the Center to produce all records of the complainant’s counseling along with a letter identifying any pertinent privileges, it refused to do so without the complainant’s consent.<sup>292</sup> This led the superior court judge to hold the executive director of the Center in

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285. *Id.* (quoting *People v. Foggy*, 521 N.E.2d 86, 96 (Ill. 1988) (Simon, J., dissenting)) (internal quotation marks omitted).

286. *Id.* at 996-97. “In considering the defendant’s request,” Justice Nolan wrote, “the judge may consider, among other things, the nature of the privilege claimed, the date the target records were produced relative to the date or dates of the alleged incident, and the nature of the crimes charged.” *Id.* at 997.

287. *Id.* at 996.

288. *Id.* at 997.

289. 667 N.E.2d 847 (Mass. 1996), *abrogated by* *Commonwealth v. Dwyer*, 859 N.E.2d 400 (Mass. 2006).

290. *Id.* at 849-50.

291. *Id.*

292. *Id.*

contempt.<sup>293</sup> A single justice of the appeals court subsequently stayed this order, and the case was transferred to the SJC by its own motion.<sup>294</sup>

In the process of vacating the contempt order, Justice Greaney modified the *prima facie* showing needed to convince judges to conduct in camera reviews of rape counseling records.<sup>295</sup> Because *Bishop*'s "likely to be relevant" standard had proven to be "too broad and flexible when applied to records protected by § 20J," *Fuller* adopted "more stringent" criteria designed to curtail the number of instances in which the absolute privilege would be abrogated.<sup>296</sup> Specifically, the *Fuller* court held that

[a] judge should undertake an in camera review of records privileged under § 20J, only when a defendant's motion for production of the records has demonstrated a good faith, specific, and reasonable basis for believing that the records will contain exculpatory evidence which is relevant and material to the issue of the defendant's guilt.<sup>297</sup>

#### E. Commonwealth v. Wanis<sup>298</sup>

On the night of February 6, 1997, a uniformed Boston police officer observed three men pass through an area near Faneuil Hall where the public was not permitted.<sup>299</sup> When the officer advised the three men to leave the area, one of them allegedly responded in a threatening manner.<sup>300</sup> While attempting to subdue this suspect, another purportedly "reached into the pocket of his leather jacket, while the third attempted to intervene on behalf of the other two."<sup>301</sup> The officer subsequently produced his service revolver and arrested the men on charges of assault and battery by means of a dangerous weapon, assault and battery on a police officer, resisting arrest, and disorderly conduct.<sup>302</sup> In the wake of this incident, one

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293. *Id.* at 849.

294. *Id.* at 849-50.

295. *Id.* at 854-56.

296. *Id.* at 854-55.

297. *Id.* at 855; *see also id.* (defining "material evidence" as "evidence which is not only likely to meet criteria of admissibility, but which also tends to create a reasonable doubt that might not otherwise exist").

298. 690 N.E.2d 407 (Mass. 1998).

299. *Id.* at 409.

300. *Id.*

301. *Id.* at 410.

302. *Id.*

of the defendants filed a citizen complaint against the officer with the Boston Police Department (“BPD”).<sup>303</sup>

When attorneys for two of the defendants moved for the production of BPD records related to the incident, a judge found that each defendant was entitled to “receive all statements relating to this case by police, other witnesses and co-defendants in the custody of the Commonwealth including police department.”<sup>304</sup> This order compelled the “production of statements of percipient witnesses obtained during the ongoing investigation conducted by the internal affairs division of the [BPD].”<sup>305</sup>

Both the BPD and the Commonwealth filed petitions for relief from the order pursuant to General Laws of Massachusetts chapter 211, section 3.<sup>306</sup> In its petition, the BPD took the position that “internal affairs records are exempt from disclosure as public records” because they are “(1) ‘investigatory materials,’ . . . and (2) materials relating to a person ‘the disclosure of which may constitute an unwarranted invasion of personal privacy.’”<sup>307</sup> Characterizing these exemptions as “similar” to the statutory privileges at issue in sexual assault cases,<sup>308</sup> the BPD argued that the stringent preliminary showing set forth in *Fuller* applied and the defendants had failed to satisfy it.<sup>309</sup>

For Chief Justice Wilkins, whether the statements at issue were subject to disclosure as public records was a red herring.<sup>310</sup> “Even if the custodian of internal affairs documents could meet the statutory burden of showing with specificity that an exemption applies, a criminal defendant may nevertheless have a right to obtain such documents.”<sup>311</sup> Ultimately, the court concluded that “a judge

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303. *Id.*

304. *Id.* (internal quotation marks omitted).

305. *Id.*

306. *Id.*

307. *Id.* (citation omitted).

308. In a footnote, the SJC appeared to take a dim view of this comparison and expressly declined to create a common law privilege to protect the disclosure of statements made to internal-affairs divisions. *See id.* at 410 n.3.

309. *Id.* at 410.

310. It is worth noting that while the *Wanis* defendants did “not argue that the subject records are public records under G.L. c. 4, § 7, Twenty-sixth,” *id.* at 642, the Committee for Public Counsel Services and the Massachusetts Association of Criminal Defense Attorneys made no such concession, *see* Brief Amici Curiae of the Committee for Public Counsel Services & the Massachusetts Ass’n of Criminal Defense Attorneys at 9 n.2, *Wanis*, 690 N.E.2d 407 (No. SJC-07569), *available at* 1997 WL 33832505, at \*9 n.2 (“[S]tatements of percipient witnesses do not fall under exemptions to the public records law.”).

311. *Wanis*, 690 N.E.2d at 411 (citation omitted).

should normally issue a subpoena to the internal affairs division of a police department directing it to produce any statements of percipient witnesses,” and that “[n]o special showing of relevance or need is required.”<sup>312</sup> Applying this standard to the case before it, the *Wanis* court ordered the BPD to “produce all statements in its possession or control received from percipient witnesses (police, codefendants, and others) concerning circumstances relating to the crime or crimes allegedly committed.”<sup>313</sup>

With respect to the Commonwealth’s petition, Chief Justice Wilkins agreed that the Suffolk County District Attorney “should not have been subjected to an order to produce documents from the police department’s internal affairs division.”<sup>314</sup> Perhaps more importantly, the court also accepted the Commonwealth’s invitation to “restrict any inquiry into Internal Affairs Division files, other than percipient witness statements, by adopting the restrictions of *Fuller*.”<sup>315</sup>

This invitation came in the final section of the brief filed on behalf of the Suffolk District Attorney and was altogether ignored by the defendants as well as amicus curiae.<sup>316</sup> According to the Suffolk District Attorney, adopting the substantial preliminary requirement set forth in *Fuller* was necessary to prevent an “unrestrained foray into confidential records” unlikely to unearth relevant information.<sup>317</sup> As the following passage makes clear, the premise of this argument rested largely on the limited role propensity evidence played in self-defense cases prior to *Adjutant*:<sup>318</sup>

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312. *Id.*

313. *Id.* at 412 (internal quotation marks omitted).

314. *Id.* at 411. On this point, the court appeared to give credence to claims that “all parts of a police department are not monolith,” and that “[b]oth practically and logically [internal-affairs divisions are] separate and distinct from the rest of a police department.” Brief of the Attorney General as Amicus Curiae at 9, *Wanis*, 690 N.E.2d 407 (No. SJC-07569), available at 1997 WL 33832506, at \*9. Accordingly, it is now clear that motions for records in the possession of an internal-affairs division must be filed under Rule 17, rather than Rule 14, and directed to records custodians at police departments rather than prosecutors.

315. Brief for the Appellant on Reservation & Report by the Single Justice of the Appellants’ Petition for Relief Under G.L. c.211, §3 from an Order of the Boston Municipal Court at 49, *Wanis*, 690 N.E.2d 407 (No. SJC-07569), available at 1997 WL 33832536, at \*49.

316. See generally Brief Amici Curiae of the Committee for Public Counsel Services & the Massachusetts Ass’n of Criminal Defense Attorneys, *supra* note 310.

317. Brief for the Appellant on Reservation & Report by the Single Justice of the Appellants’ Petition for Relief Under G.L. c.211, §3 from an Order of the Boston Municipal Court, *supra* note 315, at 42.

318. *Id.* at 44-48.



The reason for requiring [compliance with the *Bishop-Fuller* protocol] is the likely irrelevance and inadmissibility of even negative facts contained [in internal affairs records]. For instance, even assuming information of some prior bad act by an officer, such information is not necessarily material and exculpatory. Thus, even illegal acts by an arresting or investigating officer are not *per se* subject to disclosure, however, because they may be irrelevant and inadmissible in a particular case. . . .

Further, [a]s a general rule, evidence of a person's character is not admissible to prove that he acted in conformity with that character on a particular occasion. Thus, [f]or the purpose of proving that one has or has not done a particular act, it is not competent to show that he has or has not been in the habit of doing similar acts. . . .

Although a defendant charged with assault and battery . . . may offer evidence of a victim's character for violence when he asserts a claim of self-defense, under the Massachusetts rule he may do so only if he shows that the violent character of the victim *was known to him prior to the incident in question*[.] because the victim's reputation for violence is relevant solely on the issue of reasonable apprehension. Therefore, defendant must show that he was aware of the allegedly violent character of the police officers involved prior to the incident in question.<sup>319</sup>

Since knowledge of an arresting officer's violent character is no longer required to introduce such evidence at trial, using *Fuller*'s stringent threshold showing to restrict access to prior citizen complaints can no longer be justified. This conclusion becomes inescapable in light of the SJC's decision to abrogate *Fuller* "in favor of a new process that affords defense attorneys greater access to privileged information."<sup>320</sup>

#### F. Commonwealth v. Dwyer<sup>321</sup>

In 2001, the defendant and another individual named Lomberto were accused of raping and sexually assaulting their adolescent cousin over a period of several years.<sup>322</sup> Over the course of the next several months, the complainant received treatment from an array of mental health care providers.<sup>323</sup>

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319. *Id.* (citations and internal quotation marks omitted).

320. Victor Hansen, *Commonwealth v. Dwyer and the New Protocol Governing Access to Privileged Information*, BOSTON B.J., May/June 2007, at 13, 13.

321. 859 N.E.2d 400 (Mass. 2006) (per curiam).

322. *Id.* at 404.

323. *Id.*

Prior to an order severing their cases, the defendant and Lomberto sought access to records reflecting such treatment pursuant to the *Bishop-Fuller* protocol.<sup>324</sup> These motions were denied on the ground that the defendant and Lomberto had failed to make the requisite preliminary showing.<sup>325</sup>

The defendant stood trial first and was convicted.<sup>326</sup> When Lomberto's jury could not reach a verdict, the judge declared a mistrial.<sup>327</sup> Prior to his retrial, Lomberto renewed his request for the complainant's treatment records, and a different superior court judge allowed Lomberto's motion and ordered that all such records be provided for an in camera review. Ultimately, Lomberto and his attorney were permitted to examine and copy certain documents.<sup>328</sup>

Dwyer subsequently filed a motion for a new trial based, in part, on the denial of access to the complainant's therapy records. After the judge denied the motion without a hearing, the SJC ordered that Dwyer's direct appeal be consolidated with his appeal from that ruling and granted his motion for direct appellate review.<sup>329</sup>

Due to a combination of errors, the SJC found that Dwyer was entitled to a new trial.<sup>330</sup> In an opinion issued by the full bench,<sup>331</sup> the court also took the opportunity to announce "a new protocol" to be applied "in every criminal case . . . where a defendant seeks pretrial inspection of statutorily privileged records of any third party."<sup>332</sup>

This decision stemmed from the court's "continuing concerns about potential constitutional infirmities of some aspects of the

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324. *Id.* at 405.

325. *Id.* at 405-06.

326. *Id.*

327. *Id.*

328. *Id.* This proved to be a Pyrrhic victory for Lomberto. Although he was permitted to introduce redacted copies of the records at his second trial, the jury "returned guilty verdicts against Lomberto on two of the rape charges and three of the indecent assault and battery charges." *Id.*

329. *Id.* at 404, 406.

330. *Id.* at 404.

331. As commentators have noted, *Dwyer* is unusual in that opinions issued by the SJC are almost always "authored by a specifically named justice." ROSEMARY B. MINEHAN & R. MARC KANTROWITZ, 53 MASSACHUSETTS PRACTICE SERIES: MENTAL HEALTH LAW § 12.153, at 697 n.1 (2007).

332. *Dwyer*, 859 N.E.2d at 414 (noting that "the protocol is not limited to sexual assault cases"). Prior to announcing the new protocol, the SJC had formed a committee to "study and present to the court alternatives to the [*Bishop-Fuller*] protocol regarding defense access to privileged records in sexual assault cases." *Commonwealth v. Pelosi*, 805 N.E.2d 1, 2 n.1 (Mass. 2004).

*Bishop-Fuller* protocols.”<sup>333</sup> Foremost among such concerns was “the inability of defendants to meet the stringent *Fuller* standard,” notwithstanding the strong possibility that exculpatory evidence could be found in the statutorily privileged records.<sup>334</sup>

To obtain a judicial summons for such records under the *Dwyer* protocol, a defendant must first establish “good cause” by demonstrating

(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general “fishing expedition.”<sup>335</sup>

Assuming a defendant can make this preliminary showing, a court must determine whether the records in question are in fact privileged.<sup>336</sup> If a judge finds that the records are not privileged, the record holder must “produce all responsive records.”<sup>337</sup> If a particular record is not privileged but nonetheless contains “information of a personal or confidential nature, such as medical or school records,” *Dwyer* gives a judge discretion to “order such records produced subject to an appropriate protective order.”<sup>338</sup>

## V. PUBLIC RECORDS LAW IN PRACTICE

Prior to writing this Article, the authors possessed anecdotal evidence that some municipalities have a policy of providing redacted copies of citizen complaints alleging police brutality when such complaints are requested under chapter 66, section 10 of the General Laws of Massachusetts.<sup>339</sup> Armed with the number and

333. *Dwyer*, 859 N.E.2d at 414.

334. *Id.* at 417; see also *id.* at 418 (calling the *Bishop-Fuller* protocol “a court-imposed requirement all but impossible to satisfy”).

335. *Id.* at 415 (quoting *Commonwealth v. Lampron*, 806 N.E.2d 72, 76-77 (Mass. 2004)) (internal quotation marks omitted).

336. *Id.* at 420.

337. *Id.* at 421.

338. *Id.* at 421 n.5.

339. See *Opposition to Defendant’s Motion to Be Furnished with Boston Police Department Records on Internal Investigations*, *supra* note 16, at 76 (“The Defendant is entitled to the Internal Affairs records he is requesting, but he cannot obtain them by way of a court order under Rule 17. The proper way to obtain these public records is by filing a request with the Boston Police Department as required by the Freedom of In-

nature of complaints against a particular officer, defense attorneys practicing in these jurisdictions have drafted discovery motions, which have resulted in the identification of *Adjutant* witnesses.

The problem with advocating for such an approach is that records custodians across the Commonwealth appear to view their statutory obligations differently. In order to find out just how differently, three students from Western New England College School of Law sent letters to 346 cities and towns in Massachusetts.<sup>340</sup> The letter identified the statute, the ten-day period for compliance, and pertinent case law supporting a citizen's right to inspect public records. The letter requested any records of complaints made against a specific police officer in that municipality. The letter also asked for a waiver of any fees due to the educational purpose of the request.

Out of the 346 letters mailed to the cities and towns, only 64.7% replied to the request and barely half did so within the ten-day period.<sup>341</sup> The briefest response was a town stamp placed on the original letter request with a written note, "no records."<sup>342</sup> The longest response was a three-page letter acknowledging the existence of several records responsive to the request that would not be produced due to a statutory exemption. Interestingly, two towns, forty-five miles apart, sent this exact same letter.<sup>343</sup>

Most of the towns, 177 (76.9%), said that there were no records or complaints and 207 (90%) did not charge a fee.<sup>344</sup> A few found pertinent information and either summarized it in the re-

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formation Act."); *see also* Memorandum of Law in Support of Motion for Leave to Summons Internal Affairs Division Documents of the Ware Police Department Pertaining to Officer Shawn Crevier, *supra* note 19, at 3-4 (noting how documents provided in response to public-records request did not include witness names or statements).

340. A sample of the public-record request is on file with the authors. The three students who worked diligently on this project were Thomas Gray, James O'Connor, and Louis DelGiacco. The authors are grateful for their contributions to this Article.

341. *See infra* Appendix A (detailing responses); Appendix B (listing towns that did not respond).

342. Copies of all correspondence are on record with the *Western New England Law Review*.

343. *See infra* Appendix A (Brookfield and Templeton).

344. The authors chose to use both the percentages and the raw numbers in order to give the reader a picture of the full sample. However, we recognize that the percentage is only reflective of the smaller sample of 216 rather than the 351 municipalities. In total, 346 letters were sent by the students and received by the towns. There were some addressing errors and one town where the law students could not find the necessary information.

sponse letter or provided copies of the complaints.<sup>345</sup> Nineteen municipalities (8%) said that they were unable to waive the fee and provided estimates of the total cost. The least expensive estimate was \$48.06 and the most expensive was \$150.00.<sup>346</sup> Several towns did waive the fee.<sup>347</sup>

Most of the letters requested records pertaining to the chief of police.<sup>348</sup> In many jurisdictions, the chief of police is one of the only people with access to the personnel records and thirty-seven of the responses came from the chief of police. Fourteen acknowledged that the focus of the request was the same person offering the response.<sup>349</sup> Only one chief of police in the town of Auburn recused himself due to this conflict of interest.<sup>350</sup>

Among those records custodians who denied access to information, only two complied with their obligation to “advise the person denied access of his or her remedies under 950 CMR 32.00 and M.G.L. c. 66, § 10(b).”<sup>351</sup>

A final point of interest was the ripple effect that these public-records requests caused. The plain language of the statute provides that a citizen has a right to request public records without needing to show purpose or cause.<sup>352</sup> In fact, pursuant to regulations promulgated by the supervisor of records, records custodians are expressly forbidden from inquiring as to the purpose of the re-

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345. See *infra* Appendix A (Braintree, Oxford, Northbridge, and Ipswich summarized their responses; Chelsea, Dalton, and Sutton enclosed information).

346. Several others provided hourly rates and fees per page for copying. See *infra* Appendix A.

347. Towns that waived the fee: Acton, Bolton, Braintree, Chelsea, Dalton, Eastham, Holbrook, Holyoke, Ipswich, Marblehead, Methuen, New Braintree, North Reading, Northampton, Oaks Bluff, Pittsfield, Plainville, Plymouth, Sturbridge, Sutton, and Worcester. See *infra* Appendix A.

348. This was sometimes unintentional because the request was made of an officer with a long history in the department.

349. The most humorous acknowledgment came from the chief of police in Aquinnah: “Unfortunately for you, but fortunately for me, there are no records.”

350. Other chiefs of police may have recused themselves by having others in the office reply to the request, but only one letter formally notified us of this decision. One hundred and forty-four (66.6%) of the letters came from other personnel. See *infra* Appendix A for more information.

351. 950 MASS. CODE REGS. 32.08(1) (2003). These remedies include the right to appeal the adverse ruling to the supervisor of records. *Id.* 32.08(2).

352. See MASS. GEN. LAWS ch. 66, § 10(a) (2008); A GUIDE TO THE MASSACHUSETTS PUBLIC RECORDS LAW, *supra* note 164, at 7 n.15 (citing General Laws of Massachusetts chapter 66, section 10(a) for the proposition that “public records are to be provided to ‘any person’” (emphasis added)).

quest.<sup>353</sup> Surprisingly, many towns responded to the request by requiring more information prior to releasing the documents or even conducting a search.<sup>354</sup> Several record keepers called Western New England College School of Law to speak with the students overseeing the project, and one town employee called the dean of the law school questioning the motives of the request.<sup>355</sup> In replying to the letter, many towns sent a carbon copy to other parties, such as the file of the identified officer, town managers, town counsel, or even the deans of the law school.<sup>356</sup> One chief of police requested a copy of the final project and a town counselor inquired about the subject matter of the research project.<sup>357</sup>

As the foregoing makes clear, the benefits to be gleaned from a public-records request for citizen complaints are directly tied to the particular municipality that receives the request. While an arresting officer may have an extensive record of citizen abuse, if a records custodian refuses to provide copies of citizen complaints or even reply to the request, defense counsel cannot utilize the public records law to strengthen a discovery motion.

#### VI. OTHER JURISDICTIONS' APPROACHES TO INTERNAL-AFFAIRS RECORDS IN SELF-DEFENSE CASES

As noted above, Justice Cordy's decision in *Adjutant* rests, in large part, on a comprehensive survey of self-defense cases from across the country.<sup>358</sup> This survey revealed that while courts in almost all jurisdictions now admit evidence concerning a victim's pro-

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353. 950 MASS. CODE REGS. 32.05(5) ("Except when the requested records concern information which may be exempt from disclosure pursuant to [MASS. GEN. LAWS ch.] 4, §7, clause Twenty-sixth(n), [a] custodian may not require the disclosure of the reasons for which a requester seeks access to or a copy of a public record."). As one Supervisor of Public Records once noted,

Under the provisions of [MASS. GEN. LAWS ch.] 66, § 10(b), when interpreting the public record definition, one is not permitted to evaluate the special circumstances of any particular person seeking access. If a record is determined to be a public record it must be made available to any person upon request.

*The ultimate intentions of the person making the request cannot be considered.*

ALEXANDER J. CELLA, 39 MASSACHUSETTS PRACTICE SERIES: ADMINISTRATIVE LAW AND PRACTICE § 1178, at 577 n.2 (1986) (emphasis added) (citations and internal quotation marks omitted)).

354. See *infra* Appendix A (Town of Sturbridge).

355. See *infra* Appendix A (Norwood, Nantucket, Bellingham, Clinton, Manchester, Harvard, Otis, Shrewsbury, Acushnet, Wales).

356. See *infra* Appendix A (City of Holyoke).

357. See *infra* Appendix A (New Braintree and Marblehead).

358. Commonwealth v. Adjutant, 824 N.E.2d 1, 6 (Mass. 2005).

pensity for violence, the form such evidence may take varies depending on the forum.<sup>359</sup>

Colorado is one of many jurisdictions that favors reputation evidence over specific acts of violence. The rule in that state is that “specific, prior violent acts” are inadmissible if the defendant “did not, at the time of the offense, have actual knowledge of prior acts of violence committed by the victim.”<sup>360</sup> In such cases, “the defendant’s proof of the victim’s character or character trait for violence is confined to reputation or opinion testimony.”<sup>361</sup>

In contrast, the California Rules of Evidence allow a defendant charged with assaultive conduct to offer evidence regarding a victim’s violent character in the form of personal opinion, reputation, or specific instances of the victim’s conduct.<sup>362</sup> Such evidence is admissible in California regardless of whether the defendant was aware of the victim’s reputation or prior violent acts when the alleged assault occurred.

On the other end of the spectrum is New York. A defendant facing the same allegations in that state may not offer any evidence pertaining to prior violent acts by the victim or the victim’s reputation for violence unless the accused happened to be cognizant of those acts or that reputation at the time of the encounter.<sup>363</sup>

Based on the foregoing, it would be natural to assume that California defendants enjoy a distinct advantage over their counterparts in New York and Colorado when it comes to getting access to complaints about an arresting officer’s proclivity for using excessive or unnecessary force. As the discussion below will show, such an assumption is at least partly correct.

#### A. *California*

In 1973, the Supreme Court of California decided the landmark case of *Pitchess v. Superior Court*<sup>364</sup> and thereby gave birth to what has become known as a “*Pitchess* motion.”<sup>365</sup> The defendant in *Pitchess* was charged with battering four deputy sher-

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359. *Id.* at 11.

360. *People v. Ferguson*, 43 P.3d 705, 710 (Colo. Ct. App. 2001).

361. *Id.*

362. CAL. EVID. CODE § 1103(a) (West 2009).

363. See *In re Robert S.*, 420 N.E.2d 390, 391-92 (N.Y. 1981); *People v. Miller*, 349 N.E.2d 841, 845 (N.Y. 1976); *People v. DiGuglielmo*, 686 N.Y.S.2d 443, 444 (App. Div. 1999).

364. *Pitchess v. Superior Court*, 522 P.2d 305 (Cal. 1974).

365. See *City of San Jose v. Superior Court*, 850 P.2d 621, 622 (Cal. 1993).

iffs and asserted a claim of self-defense in response to the officers' use of excessive force.<sup>366</sup> He requested discovery of previously documented complaints filed against the deputy sheriffs, which he happened to know existed.<sup>367</sup> Two of the prior complainants were unavailable and two others were prepared to testify at trial but needed the formal complaints in order to refresh their memories of the details of their interactions with the officers.<sup>368</sup>

After the trial court allowed the defendant's discovery motion, the Sheriff of Los Angeles County sought a writ compelling the court to quash the subpoena duces tecum it had issued.<sup>369</sup> California's highest court declined to grant the writ.<sup>370</sup> It held that the information which defendant sought may have had "considerable significance to the preparation of his defense."<sup>371</sup> Because "the documents ha[d] been requested with adequate specificity to preclude the possibility that [the] defendant [was] engaging in a 'fishing expedition,'" the California Supreme Court affirmed the trial court's discovery order.<sup>372</sup>

The California legislature codified the "*Pitchess* motion" in 1978 by making modifications to both the penal code and the rules of evidence.<sup>373</sup> The penal code sets out the parameters for discovery requests regarding confidential personnel records maintained by state or local agencies.<sup>374</sup> The rules of evidence outline the procedural steps defense counsel must take to gain access to such records and include specific requirements concerning the notice to be provided as well as the contents of the affidavit that must be filed in support of the motion.<sup>375</sup> The rules also provide guidance for courts to determine the relevance of evidence during an in camera review, along with the authority to "make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression."<sup>376</sup> According to the California Supreme Court, the "*Pitchess* motion" codification "carefully balances two directly conflicting interests: the peace of-

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366. *Pitchess*, 522 P.2d at 307.

367. *Id.*

368. *Id.* at 309.

369. *Id.* at 307.

370. *Id.*

371. *Id.* at 309.

372. *Id.* at 307.

373. *City of San Jose v. Superior Court*, 850 P.2d 621, 622 (Cal. 1993).

374. CAL. PENAL CODE § 832.7 (West 2008).

375. CAL. EVID. CODE § 1043 (West 2009).

376. *Id.* § 1045(d).



ficer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to the defense."<sup>377</sup>

It is now clear that the prima facie showing required by *Pitchess* does not compel defendants in California to "prove the existence of the records sought as a prerequisite to a discovery order."<sup>378</sup> Instead, defense counsel in that state may infer the existence of such complaints "from the facts of the pending litigation."<sup>379</sup> As Justice Hastings once observed, a more stringent preliminary showing "would make an accused's rights dependent upon the highly fortuitous circumstance of the accused's detailed knowledge as to the contents of the police officers' personnel files."<sup>380</sup>

#### B. *New York*

One year before California decided *Pitchess*, a New York defendant charged with a narcotics violation requested an in camera review of internal affairs records to determine if they contained "a basis for cross-examination of [certain] officers as to prior 'bad acts', in order to impeach their credibility."<sup>381</sup> In opposing this motion, the police department sought to protect the privacy of its officers and took the position that "a subpoena duces tecum cannot be used to search for evidence in the absence of some showing that such evidence exists."<sup>382</sup>

After weighing the competing public policy interests, the trial court in *People v. Sumpter* declined the department's request to quash the subpoena and thereby "preclude the possibility of defense discovery of [impeachment] evidence, if it exists."<sup>383</sup> In reaching this conclusion, the court emphasized the fundamental nature of a defendant's right to cross-examination<sup>384</sup> and determined

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377. *City of San Jose*, 850 P.2d at 623.

378. *Lemelle v. Superior Court*, 143 Cal. Rptr. 450, 455 n.1 (Ct. App. 1978).

379. *City of Santa Cruz v. Municipal Court*, 776 P.2d 222, 234 n.9 (Cal. 1989).

380. *In re Valerie E.*, 123 Cal. Rptr. 242, 245 (Ct. App. 1975) (citations and internal quotation marks omitted); see also *id.* at 246 (concluding that a defendant who "clearly specified the exact material sought, i.e., all information regarding citizen complaints for excessive force against the two police officers involved in her arrest" was entitled to such discovery).

381. *People v. Sumpter*, 347 N.Y.S.2d 670, 673 (Sup. Ct. 1973).

382. *Id.* at 674.

383. *Id.* at 678.

384. *Id.* at 673.

that “[p]olice officers stand on no different footing than any other witness.”<sup>385</sup>

Within months of the *Sumpter* decision, four other New York trial courts reached contrary results and denied discovery requests for records of police misconduct.<sup>386</sup> Due to the “unclear pattern” of these rulings, New York lawmakers enacted legislation applicable to all cases where the production of internal-affairs records is sought.<sup>387</sup> Pursuant to that statute, internal-affairs records are deemed “confidential” and cannot be disclosed without the consent of the officer or a court order.<sup>388</sup> Before issuing such an order, a judge “must review all such requests and give interested parties the opportunity to be heard.”<sup>389</sup> If the judge concludes that there are sufficient facts to warrant an in camera review, the personnel records in question must be sent directly to the court.<sup>390</sup> It then becomes the judge’s task to “review the file and make a determination as to whether the records are relevant and material in the action before him.”<sup>391</sup>

Unfortunately, New York cases subsequent to the passage of this act continue to evince an unclear pattern. In *People v. Gis-sendanner*,<sup>392</sup> New York’s highest court declined to impose a preliminary burden upon defendants to establish that an internal affairs record “actually contains information that carries a potential for establishing the unreliability of either the criminal charge or of a

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385. *Id.* at 675.

386. *See* *People v. Torres*, 352 N.Y.S.2d 101, 109 (Crim. Ct. 1973) (noting that records relating to prior bad acts by officers would be inadmissible at trial due to the rule prohibiting introduction of extrinsic evidence to contradict denial of such acts); *People v. Norman*, 350 N.Y.S.2d 52, 61 (Sup. Ct. 1973) (citing the failure of defense counsel “to demonstrate any theory of relevancy or materiality of the information which may per chance be contained in the police records except for the mere speculation and surmise that some information may be revealed which may provide the defense counsel to cross examine the witness for possible impeachment”); *People v. Coleman*, 349 N.Y.S.2d 298, 302 (Nassau County Ct. 1973) (quashing subpoena based, in part, on the conclusion that defendant charged with assaulting officers was “foraging for evidence” that might make a claim of self-defense “reasonable”); *People v. Fraiser*, 348 N.Y.S.2d 529, 532 (Nassau County Ct. 1973) (finding the possibility that “useful evidence may exist” as an insufficient “legal basis for a disclosure of records”).

387. *People v. Morales*, 412 N.Y.S.2d 310, 315 (Crim. Ct. 1979); *see also* Gary R. DeFilippo, *To Disclose or Not to Disclose: A Discussion of Civil Rights Law § 50-A, Protecting Law Enforcement Officers’ Personnel Records from Unwarranted Review*, 14 J. SUFFOLK ACAD. L. 103, 106 (2000) (citing N.Y. CIVIL RIGHTS LAW § 50-a).

388. N.Y. CIVIL RIGHTS LAW § 50-a (McKinney 2009).

389. *Id.*

390. *Id.*

391. *Id.*

392. 399 N.E.2d 924 (N.Y. 1979).

witness upon whose testimony it depends.”<sup>393</sup> Instead, all the *Gis-sendanner* court required was a “good faith [assertion] of some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw.”<sup>394</sup>

Although such a factual predicate appeared to be present in the subsequent case of *People v. Francis*,<sup>395</sup> the court nevertheless denied the defendant’s request for access to prior complaints against his arresting officer.<sup>396</sup> The defendant in *Francis* was charged with second degree assault and resisting arrest.<sup>397</sup> In support of his application for the arresting officer’s internal-affairs file, the defendant asserted that he was the victim, rather than the perpetrator, of an assault and that the officer who assaulted him had previously been sued in federal court for assaulting another individual who was acquitted of the cover charges the officer brought.<sup>398</sup>

Despite the fact that an in camera review of the officer’s file revealed two complaints of excessive force, the court declined to order the disclosure of these records.<sup>399</sup> In support of this decision, the *Francis* court articulated two reasons. First, it explained that the complaints against the officer could not be used to demonstrate his “predisposition to assault individuals he arrests” since evidence of a party’s violent past could not be employed to establish conduct in conformity therewith.<sup>400</sup> Given New York’s refusal to admit propensity evidence for the purpose of resolving the identity of the first aggressor, this rationale is, on some level, understandable.

In contrast, the second ground for the court’s ruling displays an astonishing degree of naivety. In this portion of the *Francis* opinion, the court focused on the fact that the complaints of excessive force “resulted in determinations of ‘Unfounded,’ which means there was an administrative determination that the alleged incident had no basis in fact.”<sup>401</sup> Based solely on the internal-affairs department’s assessment of the evidence, the *Francis* court concluded that

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393. *Id.* at 928.

394. *Id.*

395. 566 N.Y.S.2d 486 (Sup. Ct. 1991).

396. *Id.* at 490.

397. *Id.* at 488.

398. *Id.*

399. *Id.* at 489.

400. *Id.*

401. *Id.* But see Ritchie & Mogul, *supra* note 52, at 237; Simmons, *supra* note 52, at 496; *supra* note 52 and accompanying text.

the allegations of brutality were baseless and did not need to be disclosed to the defense.<sup>402</sup>

To appreciate the danger of restricting access to internal-affairs files on such grounds, one need look no further than a recent study of the Chicago Police Department's dysfunctional disciplinary mechanisms.<sup>403</sup> As part of this study, researchers reviewed a sample of investigative files of civilian complaints and discovered that officers accused of abuse were rarely subjected to in-person interviews and investigators frequently made no contact with other officers who were present at the scene.<sup>404</sup> As one former law enforcement officer put it: "If the Chicago Police Department investigated street crime the way that it investigates police abuse, it would never solve a case."<sup>405</sup>

### C. Colorado

In Colorado, the law regarding a defendant's right to access internal affairs documents is both clear and unequivocal: "A defendant who is charged with assaulting a police officer is entitled to disclosure of the fact that complaints charging excessive use of force have been filed against that officer."<sup>406</sup> The source of this rule is *People v. Walker*.<sup>407</sup>

At trial, it was alleged that Walker participated in the robbery of a Denver bar with two other armed men.<sup>408</sup> During the course of this robbery, the defendant struck the owner of the establishment on the head with a shotgun, then grabbed his wallet and fled.<sup>409</sup> With the assistance of two civilians, a responding officer chased the defendant to a nearby alley where the two exchanged gunfire.<sup>410</sup> The defendant was struck with several bullets; the officer emerged unscathed.<sup>411</sup> During a subsequent search, the stolen wallet was recovered from the defendant.<sup>412</sup>

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402. *Francis*, 566 N.Y.S.2d at 490.

403. See generally Craig B. Futterman et al., *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System*, 1 DEPAUL J. FOR SOC. JUST. 251 (2008).

404. *Id.* at 275.

405. *Id.* at 273 (citation omitted).

406. *People v. Trujillo*, 114 P.3d 27, 30 (Colo. Ct. App. 2004) (citation omitted).

407. 666 P.2d 113, 121 (Colo. 1983).

408. *Id.* at 115.

409. *Id.* at 115-16.

410. *Id.* at 116.

411. *Id.*

412. *Id.*

Prior to trial, the defendant sought access to the internal affairs file of the officer who shot him.<sup>413</sup> After a hearing on the defendant's motion, the court elected to conduct an in camera inspection of the file but limited its review to "*sustained* complaints of brutality, excessive force, dishonesty, or untruthfulness."<sup>414</sup> Based on the absence of such complaints, the court ultimately decided not to disclose any documents to the defense.<sup>415</sup>

After a jury convicted the defendant, he argued on appeal that the decision to limit the in camera review to "sustained complaints" required reversal.<sup>416</sup> The Supreme Court of Colorado agreed. According to Justice Neighbors, "[a] defendant who is charged with assaulting a police officer is entitled to disclosure of the fact that complaints charging excessive use of force have been *filed* against the officer involved."<sup>417</sup>

The *Walker* decision is significant for three reasons. First, it exemplifies the length courts are supposed to go in giving defendants the benefit of every doubt when a self-defense claim has been asserted. As previously noted, in deciding the viability of such a defense, Massachusetts trial judges must credit the defendant's account of the incident no matter how implausible that account might appear to be. *Walker* serves as a reminder that the presumption of innocence cannot be overlooked during the discovery phase of a criminal proceeding.

Second, the *Walker* court rightly recognized that access to allegations of police misconduct cannot be dependent upon whether such allegations resulted in officer discipline. Indeed, "exonerations" by internal-affairs departments must be viewed with a jaundiced eye when Department of Justice statistics show that "use-of-force complaints received by agencies with an internal affairs unit were 'more than twice as likely to be found not sustained than in agencies not having an internal affairs unit.'"<sup>418</sup> Moreover, it must be remembered that the newly adopted standard in Massachusetts permits the introduction of "specific acts of prior violent conduct

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413. *Id.* at 121. This officer was the alleged victim of the defendant's first-degree assault.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.* at 121-22 (emphasis added); *see also id.* at 122 (refusing to predicate a defendant's discovery rights on the difference "between sustained and unsustained complaints").

418. Simmons, *supra* note 52, at 503 (quoting HICKMAN, *supra* note 51, at 5).

that the victim is *reasonably alleged* to have initiated.”<sup>419</sup> Since *Adjutant* does not require conclusive proof that the prior violent conduct occurred, findings of no fault by internal-affairs departments cannot prevent Massachusetts defendants from obtaining access to the underlying complaints.

Finally, *Walker* stands for the sensible proposition that evidence may be discoverable in a criminal case even if it is not admissible. As noted above, unlike Massachusetts, Colorado prohibits evidence relating to a victim’s acts of violence unless the defendant was aware of such conduct at the time of the alleged assault.<sup>420</sup> Since one can assume that the typical criminal defendant in Colorado lacks awareness of his arresting officer’s track record of using excessive force, complaints accusing an officer of brutality will almost never be brought to the attention of a Colorado jury. Why, then, did *Walker* carve out a path to inadmissible material?

The answer to this question may lie in the fact that the information contained in citizen complaints appears “reasonably calculated to lead to the discovery of admissible evidence.”<sup>421</sup> Ironically, if a criminal defendant charged with assaulting a police officer is acquitted, she will often have a much easier time getting access to the arresting officer’s internal-affairs file if she brings a civil rights suit.<sup>422</sup> The outcome in *Walker* may well be partly a product of the court’s discomfort in denying a criminal defendant access to infor-

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419. *Commonwealth v. Adjutant*, 824 N.E.2d 1, 13 (Mass. 2005) (emphasis added).

420. COLO. R. EVID. 404.

421. FED. R. CIV. P. 26(b)(1); *see also* COLO. R. CIV. P. 26(b)(1) (adopting the federal definition of discoverable information); MASS. R. CIV. P. 26(b)(1) (same).

422. *See, e.g., Williams v. City of Boston*, 213 F.R.D. 99, 102 (D. Mass. 2003) (collecting cases where courts have ordered the disclosure of internal-affairs records notwithstanding claims that doing so would compromise or chill investigations). This irony is compounded by the fact that victims of police brutality tend to have a much harder time admitting evidence of the defendant officer’s propensity for violence once they become plaintiffs in civil rights lawsuits. *See* FED. R. EVID. 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show the person acted in conformity therewith.”). While such evidence may serve as the cornerstone of a claim against the municipality that employed the officer, *see, e.g., Mettler v. Whitley*, 165 F.3d 1197, 1205 (1999) (citing instances where municipalities were held liable under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), due to plaintiffs’ production of “evidence of prior complaints sufficient to demonstrate that the municipalities and their officials ignored police misconduct”), it is not uncommon for courts to give an individual officer his own separate trial due to the potential prejudice that may result when a plaintiff offers evidence of prior bad acts by the officer to establish the municipality’s liability, *see generally Douglas L. Colbert, Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499 (1993).

mation a civil litigant would have little difficulty acquiring. The decision may also reflect a belief that inadmissible evidence of specific acts of violence could, in some cases, lead directly to admissible evidence regarding the arresting officer's reputation for violence.

#### CONCLUSION

Based on the foregoing, the following points appear almost self-evident. For starters, effective advocacy on behalf of a criminal defendant charged with assaulting a police officer will often depend on whether counsel can obtain access to that officer's internal-affairs file. In cases where the identity of the first aggressor is in dispute, proper pretrial preparation will almost always require the production of such documents. Corroborating a claim that the officer was the first aggressor is an uphill battle, as fact-finders are predisposed to credit the accounts of public officials entrusted with keeping the peace. Testimony from past victims of police brutality has the potential to counter this natural tendency.

A public-records request may, in some instances, produce the information a defense attorney needs to find these important witnesses and present this exculpatory evidence. However, the fate of a public-records request too often rests on the identity of the record custodian who happens to receive it. A defendant's right and ability to present *Adjutant* evidence should not depend on the willingness of a municipality to acknowledge the existence of citizen complaints. If a defendant makes a public-records request and the record custodian fails to provide the documents requested within ten days, courts should conclude that the defendant has exercised due diligence and the documents in question are not otherwise procurable in advance of trial.

There is nothing improper about requiring a defendant to make a preliminary showing to ensure that the records sought are relevant and the request for them is grounded in good faith. However, that showing should require no more than a simple assertion that the officer was the initial aggressor and any force offered by the defendant was justified in self-defense.

Other jurisdictions, like California and Colorado, have instituted procedures for obtaining internal-affairs records that rely upon in camera reviews. However, Massachusetts courts have wisely concluded that trial judges have enough to do without assuming the responsibility of examining documents with the eyes of an advocate. The protocol announced in *Dwyer* affords record cus-

todians an opportunity to draw attention to the privileged nature of any documents, or portions of any documents, in an officer's internal-affairs file. The *Dwyer* protocol also addresses legitimate concerns of law enforcement by conditioning defense counsel's receipt of personal or confidential information on compliance with the terms of a protective order.

The primary purpose of the proposal set forth in this Article is to ensure the fairest possible trials in cases involving cross-accusations of criminally violent acts. Under the present system, reasonable allegations of violence on the part of arresting officers are too often excluded from the trial process. This has increased the danger of convicting innocent defendants and resulted in the improper administration of justice.

That being said, if our approach to this dilemma is adopted, at least three other beneficial by-products seem sure to follow. First, removing inappropriate restrictions on access of internal-affairs records will likely hasten the departure of the most violent officers from police departments. Logic dictates that if an officer's track record of abuse makes it more difficult to obtain convictions, then that officer will either be headed for desk duty or will not be long for the force.

Second, as officers with a propensity for violence leave law enforcement, the frequency and intensity of police brutality will undoubtedly decrease. Finally, whitewashes by internal-affairs units appear destined to become less common the more frequently judges are put in a position to review their work. In the words of Human Rights Watch, "[P]olice brutality will subside only once superior officers judge their subordinates—and are judged themselves—on their efforts to provide sufficient and consistent oversight, appropriate administrative discipline and, when necessary, punishment of the perpetrators of abuse."<sup>423</sup>

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423. COLLINS, *supra* note 216, at 5.



## APPENDIX A—RESPONSES

Municipality	Title Of Respondent	Content	Fees Waived
Acton	Town Attorney	Searching & compiling records; however, object to request where it seeks privileged or exempt material. Sent follow-up letter on 10/06/09 to say that the search did not turn up any letters. Cc'd: Attorney Anderson, Acton Town Manager, Acton Town Clerk, Acton Chief of Police.	Yes
Acushnet	Chief of Police	No complaints. Requested records of the same person who responded in the letter (this response acknowledged connection). Called WNEC to find out purpose of request.	n/a
Adams	Town Accountant	No complaints.	n/a
Agawam	Acting Chief of Police	No complaints.	n/a
Amesbury	Lieutenant	No records.	n/a
Andover	Chief of Police	No complaints eligible under public records law and if there were, they would fall under "c" exemption. Requested records of the same person who responded in the letter.	n/a
Aquinnah	Chief of Police	No complaints. Requested records of the same person who responded in the letter. Acknowledged connection, "unfortunately for you, but fortunately for me, there are no records."	n/a
Arlington	Records Department	No complaints.	n/a
Ashburnham	Town Administrator	No complaints.	n/a
Ashland	Executive Secretary	No complaints.	n/a
Athol*	Chief of Police	No complaints. Requested records of the same person who responded in the letter, suggested further inquiry with town manager and board of selectmen.	n/a
Attleboro	Keeper of the Records – Police Department	No records.	n/a

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\* Athol was one of only two towns to provide a response that included a notice of the appeals process. *See infra* Brookfield.

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## ADJUTANT AND INTERNAL AFFAIRS

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Municipality	Title Of Respondent	Content	Fees Waived
Auburn	Lieutenant	No complaints. Chief recused himself from the matter because he was the subject of the request. Cc'd: Acting Town Manager, Attorney.	n/a
Avon	Deputy Chief	Extensive search.	No
Ayer	Chief of Police	If records exist, held at Ayer Town Hall. Supplied address for Town Hall.	n/a
Barre	Town Administrator	Will not look until authorized in writing to pay for fees. 20¢/page.	No
Becket	Unknown	No complaints.	n/a
Bedford	Chief of Police	No complaints. Requested records of the same person who responded in the letter.	n/a
Bellingham	Captain	Found 11 pages associated with request. Cost and preparation for mailing record \$1/page or 50¢ if picked up. Asked Dean Gaudio what we were doing; accused us of having an agenda; the officer whose documents were requested made the call.	No
Belmont	Chief of Police	Exemptions under G.L. c. 4, §7(26), denied request but then added that there are no citizen complaints.	n/a
Berkley	Chief of Police	Paper records, limited employees with access, costly search. Fee is 20¢ per page and \$32.76/hour for personnel. Cc'd: Town Counsel.	No
Beverly	Captain	No records.	n/a
Billerica	Deputy Chief	No records.	n/a
Bolton	Administrative Assistant	No complaints.	Yes
Bourne	Administrative Secretary to Chief of Police	No complaints.	n/a
Boxborough	Chief of Police	No complaints. Requested records of the same person who responded in the letter (this response acknowledged connection).	n/a
Boxford	Lieutenant	No complaints.	n/a
Boylston	Administrative Assistant	No complaints.	n/a
Braintree	Chief of Police	One anonymous complaint that turned out to be a disgruntled deputy chief, willing to provide copies. Requested records of the same person who responded in the letter (this response acknowledged connection).	Yes

Municipality	Title Of Respondent	Content	Fees Waived
Brewster	Lieutenant	Will not look until authorized in writing to pay for fees. 50¢/page and \$26.03/hr with estimate work time of 2-3 hours.	No
Bridgewater	Acting Chief of Police	No records.	n/a
Brockton	Sergeant, Internal Affairs	No complaints. Request reviewed by Brockton law department prior to response. Chastised for not using the proper title of "chief of police."	n/a
Brookfield*	Administrative Assistant	Several records responsive to request but refuse to provide them based upon exemption (f) investigatory materials. 3-page letter (exact same letter as used in Templeton). Cc'd: Acting Police Chief, Town Counsel.	No
Brookline	Lieutenant	No records.	n/a
Buckland	Chief of Police	Content. Requested records of the same person who responded in the letter.	n/a
Burlington	Chief of Police	No records. Requested records of the same person who responded in the letter (this response acknowledged connection). Standardized form. Accompanied reply.	n/a
Cambridge	Legal Advisor	No records.	n/a
Canton	Lieutenant	No complaints.	n/a
Carver	Chief of Police	No records.	n/a
Chelmsford	Administrative Assistant – Chelmsford Police Dept.	No records.	n/a
Chelsea	City Solicitor	One record from internal affairs investigation enclosed.	Yes
Chesterfield	Town Administrator	No complaints.	n/a
Chilmark	Chief of Police	No records.	n/a
Clinton		Telephone call to ask the purpose.	
Cohasset	Lieutenant, Patrol Commander	No complaints.	n/a
Concord	Deputy Chief	No records. No complaints as Chief for 17 years or entire career.	n/a
Dalton	Chief of Police	Requested records enclosed, redacted based on advice from Town Counsel. Waived \$11.00 fee.	Yes

\* Brookfield was one of only two towns to provide a response that included a notice of the appeals process. *See supra* Athol.

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Municipality	Title Of Respondent	Content	Fees Waived
Danvers	Administrative Services Commander	No complaints.	n/a
Dartmouth	Records Division	No complaints.	n/a
Dedham	Lieutenant	No complaints.	n/a
Deerfield	Town Administrator	No complaints. Cc'd: Chief of Police, file.	n/a
Dennis	Commander of Support Services	No complaints. Noted that this does not reflect records of any other municipality.	n/a
Dover	Keeper of the Records, Dover Police Department	No "Officer Griffin" but there is a "Chief" Griffin, need to contact Dover Town Administrator.	n/a
Dracut	Deputy Chief	No complaints.	n/a
Dudley	Town Attorney	Will search records and reply within statutory period. Cc'd: Police Chief, attorney.	Unknown
Dunstable	Chief of Police	No complaints. Requested records of the same person who responded in the letter.	n/a
Duxbury	Lieutenant	No complaints.	n/a
East Bridgewater	Administrative Specialist on behalf of Keeper of the Records	No complaints.	n/a
East Brookfield	Sergeant, Keeper of the Records, Internal Affairs	No complaints.	n/a
East Longmeadow	Administrative Assistant / Office Manager	No complaints. Search limited to their jurisdiction.	n/a
Eastham	Chief of Police	Police officer no longer employed, researching records. Checked file and sent follow-up letter on 09/28/09 to confirm that there are no complaints.	Yes
Easthampton	Keeper of the Records – Easthampton Police Dept.	M.G.L. c. 66, §10(a) allows police to charge copying and research time.	No
Easton	Chief of Police	No complaints.	n/a
Edgartown	Administrative Assistant	No complaints.	n/a
Egremont	Records Department	No complaints.	n/a
Erving	Chief of Police	No complaints.	n/a
Essex	Chief of Police	No complaints. Requested records of the same person who responded in the letter.	n/a
Everett	Captain, Administrative Services	No complaints.	n/a

Municipality	Title Of Respondent	Content	Fees Waived
Fairhaven	Chief of Police	No complaints.	n/a
Framingham	Assistant to the Chief of Police	No complaints.	n/a
Franklin	Town Attorney	No records. Complaints would not be handled through internal affairs. Cc'd: Town Administrator, Chief of Police.	n/a
Freetown	Chief of Police	No complaints. Requested records of the same person who responded in the letter.	n/a
Georgetown	Chief of Police	No records. Requested records of the same person who responded in the letter.	n/a
Gill	Town Administrator	Included letters sent to the Chief about the complaint against him, follow-up letter sent to the people who filed the complaint as well as the minutes of the meeting where the complaint was reviewed.	Yes
Gloucester	Chief of Police	No complaints.	n/a
Goshen	Sergeant	No complaints.	n/a
Grafton	Chief of Police	No complaints. Requested records of the same person who responded in the letter.	n/a
Granby	Lieutenant	No records.	n/a
Granville	Chief of Police	No records.	n/a
Great Barrington	Chief of Police	No records.	n/a
Groton	H.R. Director	No complaints.	n/a
Groveland	Chief of Police	No records.	n/a
Halifax	Town Administrator	No records.	n/a
Hamilton	Chief of Police	No records. Cc'd: file.	n/a
Hampden	Administrative Assistant	Subject to a fee.	No
Hanson	Lieutenant	No records.	n/a
Hardwick	Hardwick Police Dept.	No records.	n/a
Haverhill	Chief of Police	No records. Requested records of the same person who responded in the letter (this response acknowledged connection).	n/a
Hawley	Administrative Assistant	No complaints.	n/a
Heath	Officer Assistant	No records.	n/a
Hingham	Human Resources Office	No complaints.	n/a
Hinsdale	Sergeant	No records.	n/a
Holbrook	Acting Chief of Police	No records.	Yes

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## ADJUTANT AND INTERNAL AFFAIRS

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Municipality	Title Of Respondent	Content	Fees Waived
Holden	Project Coordinator	No records.	n/a
Holliston	Lieutenant	No records.	n/a
Holyoke	Chief of Police	No records. Requested records of the same person who responded in the letter (this response acknowledged connection). Cc'd: Dean Arthur Gaudio, Dean Beth Cohen, Brenda Garton, Central File.	Yes
Hopkinton	Administrative Manager	No complaints.	n/a
Hudson	Captain, Supervisor of Internal Affairs	No records.	n/a
Hull	Town Attorney	Will review request and reply at later date. Cc'd: Town Manager.	Unknown
Huntington	Administrative Assistant	No records.	n/a
Ipswich	Chief of Police	Summarized citizen complaint of rude treatment during traffic stop. Cc'd: focus of request.	Yes
Kingston	Chief of Police	No records.	n/a
Lanesborough	Chief of Police	No records.	n/a
Lee	Chief of Police	No records.	n/a
Leicester	Chief of Police	No complaints. Requested records of the same person who responded in the letter. Cc'd: Internal Affairs file.	No
Lenox	Chief of Police	No records.	n/a
Leverett	Chief of Police	No records. Requested records of the same person who responded in the letter.	n/a
Lexington	Chief of Police	No records.	n/a
Lincoln	Lieutenant	No complaints.	n/a
Littleton	Chief of Police	No complaints in last 11 years, would be a fee to access prior files. Estimates cost no more than \$100, requested records of the same person who responded in the letter (this response acknowledged connection).	No
Longmeadow	Records Clerk	No records.	n/a
Lowell	Superintendent of Police	Forwarded request to city solicitor for her review. Cc'd: City Solicitor.	n/a
Lunenburg	Unknown	No records.	n/a

Municipality	Title Of Respondent	Content	Fees Waived
Lynnfield	Chief of Police	No complaints.	n/a
Manchester	Unknown	No complaints. Told the person whose info was requested (former employee), that person then called WNEC.	n/a
Marblehead	Assistant Town Counsel	Advised police chief to review records, will need time to conduct. Inquired as to the subject matter of the research project. Follow-up letter sent 10/14/09, no records, no fee. Cc'd: Town Administrator, Chief of Police.	Yes
Marion	Chief of Police	No records.	n/a
Mashpee	Keeper of Records	No records.	n/a
Medfield	Chief of Police	No records. Requested records of the same person who responded in the letter.	n/a
Melrose	Chief of Police	Need to obtain permission from focus of request. 50¢/page and reasonable labor fee.	No
Mendon	Chief of Police	No complaints. Requested records of the same person who responded in the letter.	n/a
Methuen	City Solicitor	Sent copies of 1A records.	Yes
Milford	Deputy Chief	No records.	n/a
Millbury	Chief of Police	No records. Requested records of the same person who responded in the letter.	n/a
Monson	Unknown	No records.	n/a
Montague	Board of Selectman Chairman	No complaints.	n/a
Monterey	Interdepartmental Secretary	No records.	n/a
Nantucket	Unknown	Phone call to ask how to send a response of "no records."	n/a
Natick	Attorney's Office	Request being researched and estimated costs will be tallied. Cc'd: Natick Police Department.	No
Needham	Lieutenant, Keeper of the Records	No records. Reserved the right to withhold information in the future.	n/a
New Bedford	Assistant City Solicitor	Denied request under exemption M.G.L. c. 4, §7	n/a
New Braintree	Chief of Police	No records. Requested records of the same person who responded in the letter (this response acknowledged connection). Requested copy of completed research project.	Yes

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## ADJUTANT AND INTERNAL AFFAIRS

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Municipality	Title Of Respondent	Content	Fees Waived
New Salem	Chief of Police	No complaints. Requested records of the same person who responded in the letter.	Yes
Newburyport	Administrative Assistant	No records.	n/a
Newton	Lieutenant, Internal Affairs Bureau	No records.	n/a
North Adams	Director	No records.	n/a
North Andover	Records Department	No records.	n/a
North Reading	Lieutenant	No records.	Yes
Northampton	Captain	Redacted record enclosed, can petition for redacted information through office of secretary. Cc'd: Captain.	Yes
Northborough	Lieutenant	No records.	n/a
Northbridge	Chief of Police	Summarized content of citizen complaint, will provide estimate if need actual court documents. Requested records of the same person who responded in the letter.	No
Northfield	Administrative Assistant	No records. Cc'd: Acting Police Chief.	n/a
Norwell	Chief of Police	No records.	n/a
Norwood	Unknown	Phone call to ask how to send a response of "no records."	n/a
Oak Bluffs	Executive Assistant	Sent copies of 1A records.	Yes
Orange	Administrative Assistant	No complaints.	n/a
Otis	Unknown	Chief wanted to know why her name was used.	n/a
Oxford	Chief of Police	One complaint lodged in mid 1990's, but no record of it, could try Town Manager's officer. Requested records of the same person who responded in the letter (this response acknowledged connection).	n/a
Palmer	Senior Emergency Telecommunicator/ Administrative Assistant	No records.	n/a
Peabody	Chief of Police	No officer under that name employed presently or past.	n/a
Pembroke	Unknown	No complaints.	n/a
Pittsfield	City Solicitor	Preparing good faith estimate of costs. May consider request to waive fees once cost is known.	Yes



Municipality	Title Of Respondent	Content	Fees Waived
Plainfield	Chief of Police	Requested files of an officer not working in Plainfield.	n/a
Plainville	Chief of Police	No complaints. Requested records of the same person who responded in the letter.	Yes
Plymouth	Captain	No records.	Yes
Plympton	Administrative Clerk	No complaints.	n/a
Princeton	Acting Chief of Police	No records.	n/a
Provincetown	Records Clerk	No complaints.	n/a
Quincy	Captain	Internal Affairs files not considered public records, protected under 26(c) privacy exemption, Chief of Police discretion cited <i>Worcester Telegram &amp; Gazette</i> .	n/a
Randolph	Unknown	Person unknown.	n/a
Raynham	Chief of Police	Denied request under exemption M.G.L. c. 4, §7. Requested records of the same person who responded in the letter.	n/a
Reading	Lieutenant	No complaints.	n/a
Richmond	Town Administrator	No records.	n/a
Rochester	Chief of Police	No records. Requested records of the same person who responded in the letter.	n/a
Rowley	Keeper of Records	Request to waive fees denied.	No
Rutland	Keeper of Records	No records. Cc'd: file.	n/a
Salem	Captain	No complaints.	n/a
Salisbury	Keeper of Records	No records.	n/a
Sandwich	Executive Administrative Assistant	No records.	n/a
Saugus	Assistant Chief	No records. Requests more info on the type of info requested for the project, offers help with project.	n/a
Savoy	Office Manager	No records.	n/a
Scituate	Town Administrator	Requested clarification of the request (was it about when the Chief was an officer or about his entire career?), also states that they are new at their job and it will take them longer.	n/a
Sharon	Administrative Assistant to the Chief	No records.	n/a

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## ADJUTANT AND INTERNAL AFFAIRS

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Municipality	Title Of Respondent	Content	Fees Waived
Sheffield	Town Administrator	No records.	n/a
Sherborn	Chief of Police	No records. Cc'd: records request file.	n/a
Shirley	Executive Secretary	No records.	n/a
Shrewsbury	Town Manager	No records. Telephone call to ask the purpose.	n/a
Shutesbury	Chief of Police	No records. Requested records of the same person who responded in the letter (this response acknowledged connection).	n/a
Somerville	Office of Professional Standards	No records.	n/a
South Hadley	Keeper of Records	Need to discuss things by phone before complying with request. Included phone number.	n/a
Southborough	Town Administrator	No records.	n/a
Southwick	Keeper of Records	No records.	n/a
Sterling	Unknown	No records.	n/a
Stoughton	Acting Chief of Police	No records.	n/a
Stow	Chief of Police	No records. Requested records of the same person who responded in the letter (this response acknowledged connection).	n/a
Sturbridge	Unknown	Two phone calls to WNEC prior to sending letter to say no citizen complaints.	Yes
Sudbury	Acting Chief of Police	No records.	n/a
Sutton	Unknown	Mailed specific memo with no cover letter. Sent memo regarding citizen complaint.	Yes
Swampscott	Administrative Assistant	No records.	n/a
Swansea	Town Attorney	No records.	n/a
Taunton	Detective Captain	No records. Called attention to the fact that police department records are only retained for 7 years after the closure of the action.	n/a
Templeton	Chief of Police	Several records responsive to request but refuse to provide them based upon exemption (f) investigatory materials. 3-page letter (exact same letter as used in Brookfield). Cc'd: Town Counsel, Selectmen's Office.	No

Municipality	Title Of Respondent	Content	Fees Waived
Tisbury	Administrative Assistant to the Chief	No complaints.	n/a
Topsfield	Chief of Police	No complaints.	n/a
Townsend	Chief of Police	No records. Requested records of the same person who responded in the letter (the response acknowledged connection).	n/a
Tyngsborough	Deputy Chief	No records.	n/a
Wales	Chief of Police	No records. Called to ask purpose of request.	n/a
Walpole	Chief of Police	No records. Requested records of the same person who responded in the letter.	n/a
Waltham	Law Department	Estimate of cost of search. Estimated total = \$150.00.	No
Ware	Administrative Officer	Denied request under exemption M.G.L. c. 4, § 7 cl 26(c)	n/a
Wareham	Lieutenant	No records. Sent certified mail.	n/a
Warren	Chief of Police	No complaints.	n/a
Wayland	Lieutenant	No records. Cc'd: Town Counsel.	n/a
Wellesley	Chief of Police	No records. Requested records of the same person who responded in the letter.	n/a
Wellfleet	Unknown	No records.	n/a
Wendell	Town Coordinator	No records.	n/a
West Boylston	Chief of Police	No complaints. Requested records of the same person who responded in the letter.	n/a
West Brookfield	Administrative Assistant	No records.	n/a
West Newbury	Administrative Assistant	No records.	n/a
West Springfield	Chief of Police	No records. (cc'd: Town Counsel)	n/a
West Stockbridge	Chief of Police	No complaints.	n/a
West Tisbury	Administrative Assistant	No records.	n/a
Westborough	Administrative Assistant	No records.	n/a
Westfield	Chief of Police	No records. Requested records of the same person who responded in the letter (this response acknowledge connection).	n/a
Westhampton	Administrative Assistant	No records.	n/a
Westminster	Chief of Police	No records. Requested records of the same person who responded in the letter (this response acknowledge connection).	n/a

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## ADJUTANT AND INTERNAL AFFAIRS

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Municipality	Title Of Respondent	Content	Fees Waived
Weston	Keeper of Records	Estimate of cost of search. Estimated total = \$48.06.	No
Westwood	Administrative Lieutenant	No records.	n/a
Weymouth	Acting Chief of Police	No complaints. Explained process of going through the personnel file.	n/a
Wilbraham	Chief of Police	No records.	n/a
Williamsburg	Acting Chief of Police	No records.	n/a
Williamstown	Records	No complaints.	n/a
Wilmington	Deputy Chief	No records.	n/a
Winchendon	Police Clerk	No records.	n/a
Worcester	Captain	No records.	Yes
Worthington	Chief of Police	No records. Requested records of the same person who responded in the letter.	n/a
Wrentham	Records	No complaints.	n/a

# APPENDIX B—MUNICIPALITIES THAT DID NOT RESPOND TO PUBLIC RECORDS REQUEST

Abington	Gosnold	Milton	Southbridge
Alford	Greenfield	Monroe	Spencer
Amherst	Hadley	Montgomery	Springfield
Ashby	Hancock	Mt. Washington	Stockbridge
Ashfield	Hanover	Nahant	Stoneham
Barnstable	Harwich	New Ashford	Sunderland
Belchertown	Hatfield	New Marlborough	Tewksbury
Berlin	Holland	Newbury	Tolland
Bernardston	Hopedale	Norfolk	Townsend
Blackstone	Hopkinton	North Attleboro	Truro
Blandford	Hubbardston	North Brookfield	Tyringham
Boston	Lakeville	Norton	Upton
Brimfield	Lancaster	Oakham	Uxbridge
Carlisle	Lawrence	Orleans	Wakefield
Charlemont	Leominster	Paxton	Warwick
Charlton	Leyden	Pelham	Washington
Chatham	Ludlow	Pepperell	Watertown
Cheshire	Lynn	Peru	Webster
Chester	Malden	Petersham	Wenham
Chicopee	Mansfield	Phillipston	West Bridgewater
Clarksburg	Marlborough	Rehoboth	Westford
Colrain	Marshfield	Revere	Westport
Conway	Mattapoissett	Rockland	Whately
Cummington	Maynard	Rockport	Whitman
Dighton	Medford	Rowe	Winchester
Douglas	Medway	Royalston	Windsor
Fall River	Merrimac	Russell	Winthrop
Falmouth	Middleborough	Sandisfield	Woburn
Fitchburg	Middlefield	Seekonk	Yarmouth
Florida	Middleton	Shelburne	
Foxborough	Millis	Somerset	
Gardner	Millville	Southampton	